CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 549

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., PETITIONERS,

vs.

BRASHEAR FREIGHT LINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1940.

CERTIORARI GRANTED DECEMBER 16, 1940.

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[fol. a] [Caption omitted.]

[fol. 1]

IN DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 665. In Equity

BRASHEAR FREIGHT LINES, INC., et al., Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI; STATE HIGHWAY COMMISSION OF MISSOURI; B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Hon. Roy McKittrick, Attorney-General of the State of Missouri, Defendants

NOTICE OF APPEAL—Filed October 3, 1939

Notice is hereby given that Public Service Commission of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney-General of the State of Missouri, defendants above named, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the Order Overruling Motion For Damages, which said Order appealed from reads as follows:

"It appearing to the Court that the subject matter and the relief prayed for in defendants' Motion For Damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion above referred to is hereby overruled."

The above Order, from which appeal is taken, was entered on July 5, 1939.

James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Jefferson City, Missouri, Attorneys for Appellants.

[fol. 2] MEMORANDUM OF MINUTE ENTRY OF OCTOBER 3, 1939, SHOWING MAILING OF NOTICE OF APPEAL

October 3, 1939—Notice of Appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order Overruling Motion for Damages, in the case of Brashear Freight Lines, Inc., et al., vs. Public Service Commission of Missouri, et al., No. 665, In Equity, mailed to Mr. Kenneth Teasdale, Attorney for Plaintiff, Boatmen's Bank Building, St. Louis, Missouri, in compliance with Section d of Rule 73 of the New Rules of Civil Procedure for the District Courts.

IN UNITED STATES DISTRICT COURT

BRASHEAR FREIGHT LINES, INC. (A Corporation), ST. LOUIS FORWARDING COMPANY (A Corporation), St. Louis Eastern Truck Lines, Inc. (A Corporation), Viking Freight Company (A Corporation), Be-Mac Transport Company, Inc. (A Corporation), Consolidated Forwarding Company, Inc. (A Corporation), Husmann & Roper Freight Lines, Inc. (A Corporation), Mound City Forwarding Company, Inc. (A Corporation), Powell Brothers Truck Lines, Inc. (A Corporation), Toedebusch Transfer, Inc. (A Corporation), Highway Merchandise Carriers, Inc. (A Corporation), Campbell 66 Express, Inc. (A Corporation), Midland Truck Line, Inc. (A Corporation), Lawrence A. Elliott Truck Service, Inc. (A Corporation), Gordon's Transports, Inc. (A Corporation), George Kimbel Truck Lines, Inc. (A Corporation), Missouri, Kansas & Colorado, Inc. (A Corporation), L. A. Tucker Truck Line, Inc. (A Corporation), Schwartz Truck Terminal (A Corporation), Superior Forwarding Company, Inc. (A Corporation), Cole Motor Service, Inc. (A Corporation), Commerce Cartage Company (A Corporation), Spector Motor Service, Inc. (A Corporation), Potashnick [fol. 3] Truck Service, Inc. (A Corporation), Bryant Truck Lines, Inc. (A Corporation), F. & F. Transportation Company, Inc. (A Corporation), Dexter Daily Truck Service, Inc. (A Corporation), Night Hawk, Inc. (A Corporation), Western Trucking Company, Inc. (A Corporation), Decatur Cartage Company (A Corporation), F.

F. Frey Company (A Corporation), Dohrn Transfer Company (A Corporation), Lucido Bros. Grocery Company, Inc. (A Corporation), Interstate Dispatch, Inc. (A Corporation), Hayes Freight Lines, Inc. (A Corporation), Egyptian Express (A Corporation), Roadway Express, Inc. (A Corporation), Service Lines, Inc. (A Corporation), Wilson Truck Company (A Corporation), Highway Express, Inc. (A Corporation), Robinson Motor Lines (A Corporation), Voss Truck Lines, Inc. (A Corporation), Southport Truck Lines (A Corporation), Kern, Inc. (A Corporation), Transamerican Freight Lines, Inc. (A Corporation), C. F. Reddish, Doing Business as Reddish Truck Service, R. A. Sand, Doing Business as Sand Motor Express Company, William Shadalov, Doing Business as Overnight Freight Service, Clarence M. Robertson, Doing Business as Robertson Truck Lines, Plaintiffs,

vs.

Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol and Honorable Roy McKittrick, Attorney General of the State of Missouri, Defendants

Bill in Equity—Filed May 15, 1937

The Plaintiffs above named file this, their Bill in Equity, and, for their cause of action, respectfully state:

That plaintiffs Brashear Freight Lines, St. Louis Forwarding Company, St. Louis Eastern Truck Lines, Inc., Viking Freight Company, Be-Mac Transport Company, Inc., Consolidated Forwarding Company, Inc., Husmann & Roper Freight Lines, Inc., Mound City Forwarding Company, Inc., Powell Brothers Truck Lines, Inc., Toedebusch Transfer, Inc., Highway Merchandise Carriers, Inc., Campbell 66 Express, Inc., Midland Truck Line, Inc., Lawrence A. Elliott [fol. 4] Truck Service, Inc., Gordon's Transports, Inc., George Kimbel Truck Lines, Inc., Missouri, Kansas & Colorado, Inc., L. A. Tucker Truck Line, Inc., Schwartz Truck Terminal, Superior Forwarding Company, Inc., Cole Motor Service, Inc., Commerce Cartage Company, Spector Motor Service, Inc., Potashnick Truck Service, Inc., Bryant Truck Lines, Inc., F. & F. Transportation Company, Inc., and Dex-

ter Daily Truck Service, Inc., are corporations organized and existing under and by virtue of the laws of the State of Missouri; that defendants Night Hawk, Inc., Western Trucking Company, Inc., Decatur Cartage Company, F. F. Frey Company, Dohrn Transfer Company, Lucido Bros. Grocery Company, Inc., Interstate Dispatch, Inc., Hayes Freight Lines, Inc., and Egyptian Express, are corporations organized and existing under and by virtue of the laws of the State of Illinois; that Roadway Express, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Ohio; that Service Lines, Inc., Wilson Truck Company, and Highway Express, Inc., are corporations organized and existing under and by virtue of the laws of the State of Tennessee; that Robinson Motor Lines is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that Voxx Truck Lines, Inc., and Southport Truck Lines are corporations organized and existing under and by virtue of the laws of the State of Oklahoma; that Kern, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana; and Transamerican Freight Lines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Michigan; that plaintiff C. F. Reddish is engaged as a common carrier, doing business under the name and style of Reddish Truck Service; that plaintiff R. A. Sand is engaged as a common carrier, doing business under the name and style of Sand Motor Express Company; that plaintiff William Shandalov is engaged as a common carrier, doing business under the name and style of Overnight Freight Service; and that plaintiff Clarence M. Robertson is engaged as a common carrier, doing business under the name and style of Robertson Truck Lines. Plaintiffs state that they are all engaged as common carriers by motor vehicle in the carriage of property in interstate commerce to, from, and within the State of Missouri.

[fol. 5] That defendant Public Service Commission of Missouri is an entity created and established by the laws of the State of Missouri, and, as such, authorized by the laws of the State of Missouri, and, as such, authorized to sue and be sued in its official name, and having its principal office at the City of Jefferson City, the State capital of the State of Missouri; that said defendant, by the laws of the State

of Missouri, is, among other things, vested with jurisdiction and supervision with reference to all common carriers operating or doing business within said State, and with reference to persons, corporations, or partnerships engaged in the transportation of property or freight within said State.

That defendant State Highway Commission of Missouri is an entity created and established by virtue of the laws of the State of Missouri, and, as such, authorized to sue and be sued in its official name; that said defendant, by the laws of the State of Missouri, has supervision of highways and bridges which are constructed, improved and maintained in the State of Missouri.

Plaintiffs further state that said State Highway Commission has direction of, and supervision over, the Missouri State Highway Patrol, which is authorized by the laws of the State of Missouri to patrol the highways constructed and maintained by the State Highway Commission of Missouri to regulate the movements of traffic thereon and to enforce thereon the laws of the State of Missouri relating to the operation and use of vehicles on the highways thereof, and to enforce and prevent violation of all laws with reference to the use of said highways; that defendant B. M. Casteel is Superintendent of the State Highway Patrol, and, as such, has command of same and directs its activities.

That the Honorable Roy McKittrick is the duly elected, qualified, and acting Attorney General of the State of Missouri, and, as such, is charged with the duty of enforcing the laws thereof, and is a citizen and resident of the State of Missouri, and resident within the Central Division of the Western Judicial District of Missouri.

That each of the defendants was, at all times herein mentioned, and still is, a resident and citizen of the State of [fol. 6] Missouri, and of the Central Division of the Western Judicial District of Missouri.

That the grounds upon which the jurisdiction of this Court in this action depends are that the questions involved herein are questions arising under the Constitution and the laws of the United States, and arising by authority of the fact that certain laws and regulations promulgated pursuant thereto of the State of Missouri are in conflict with the Constitution and laws of the United States, and that the matter in controversy exceeds as to each plaintiff the

sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Plaintiffs further state that at all times herein mentioned they were, and now are, motor carriers, being common carriers of property for hire, engaged in the business of carrying property, by means of motor vehicles, over the highways of the States of Missouri, Illinois, and of other States, and that they have invested in equipment and in goodwill and in an established clientele in said business the sum of several hundreds of thousands of dollars; that they severally own and operate fleets of motor trucks carrying property for hire in interstate commerce in the State of Missouri.

Plaintiffs further state that there was enacted by the General Assembly of the State of Missouri a certain act, approved on May 6, 1931, and entitled, "An Act To Repeal Article VIII of Chapter 33 of the Revised Statutes of Missouri, 1929," entitled "Transportation of Persons By Motor Vehicles," and to enact in lieu thereof a new article containing seventeen sections, numbers 5264 to 5280, both inclusive, and to be known as Article VIII of Chapter 33, providing for the supervision, regulation, and licensing of transportation of persons and property for hire over the public highways of the State of Missouri by motor vehicle, conferring jurisdiction upon the Public Service Commission to license, regulate, and supervise such transportation, providing for the enforcement of the provisions of this act, and for the punishment for violation thereof.

Plaintiff further states that, acting under said Act of the General Assembly of the State of Missouri, or purporting to act thereunder, defendant, the Public Service [fol. 7] Commission of the State of Missouri, at a session held at the office of the Public Service Commission in Jefferson City, in the State of Missouri, on September 14, 1931, all of said members being present, adopted General Order No. 27 of said Commission, canceling General Order No. 25, heretofore issued by said Commission, Said General Order No. 27 becoming effective on the 15th day of September, 1931, and establishing certain rules, regulations and forms, relating to the operation of motor carriers and contract haulers in the transportation of persons and property, for hire, by motor vehicle on the public highways in the State of Missouri, a duly authorized copy of said rules, regulations and forms being filed in the archives of said Public Service

Commission, and providing that such copy shall be deemed an original record; said rules, regulations, and forms being, in part as follows:

RULES, REGULATIONS AND FORMS

Rule No. 6. Application for Interstate Permit, Persons and/or Property.

Rule No. 7. Annual License Requirements.

Rule No. 12. Liability Insurance. Interstate Carrier of Persons or Property.

Rule No. 13. Liability Insurance. Indorsement. Interstate Carrier of Persons or Property.

Rule No. 20. Trailers to be Licensed.

Rule No. 27. Annual License Must Be Attached to Vehicles.

Rule No. 33. Motor Vehicles Must Carry P.S.C. No.

Rule No. 34. License Fee Based on Weight-Carrying Capacity.

Rule No. 35. Applicant Must Furnish Load Capacity Data.

Rule No. 36. Vehicle Must have Weight Capacity Mark On Side.

Rule No. 40. Accidents Must Be Reported.

Rule No. 44. Interstate Operators—Limitations of Service.

[fol. 8] Rule No. 47. Articles Prohibited, or Regulated, in Freight Service.

Rule No. 48. Braking Requirements.

Rule No. 49. Ventilators, Speedometers, Skid Chains, Extra Tire.

Rule 50. Motor Vehicles Must Be Amply Strong For Maximum Load; Other Requirements.

Rule No. 52. Motor Vehicle Lighting Requirements.

Rule No. 53. Receipts for Freight Required.

Rule No. 56. Red Torches or Flags for Stalled Vehicles.

Rule No. 57. Working Hours Requirements.

Rule No. 62. Drivers Shall Slow Down at Bridges, Curves, Etc.

Rule No. 63. Speed Requirements.

Rule No. 64. Tariff Provisions.

Rule No. 65. Tariffs Must Be On Standard Forms.

Rule No. 66. Copies of Tariffs Must Be Filled.

Rule No. 68. Special Tariff Rules Governing Transportation of Property.

Rule No. 69. Contract Haulers Must File Rates, Etc.
Rule No. 73. Daily Record of Vehicles Used.
Rule No. 74. Annual Reports Required.
Rule No. 76. Penalty for Violation. The violation of any of the foregoing rules shall be a cause for revocation of the certificates of convenience and necessity of permits issued by the Commision.

(The rules mentioned above were pleaded at length, but, by agreement, titles only are saved for the Transcript of Record.)

Plaintiffs further state that defendants are threatening to enforce the aforesaid act of the General Assembly of the State of Missouri as to them, and are threatening to enforce the provisions of said General Order No. 27, and have [fol. 9] advised plaintiffs of their intention so to do, and have advised plaintiffs that unless in all manner and respect they comply with the provisions of said act of the General Assembly, and of said General Order No. 27, that they will be barred from entering the State of Missouri, and from engaging in interstate commerce therein, and will be prevented from carrying property in interstate commerce to terminals in the City of St. Louis, and to other points in the State of Missouri in interstate commerce, and that defendants are threatening to bring against plaintiffs actions to forfeit and pay to the State of Missouri the license fees provided for in Section 5272 of the aforesaid act of the General Assembly of the State of Missouri, and actions to forfeit and pay to the State of Missouri the penalties provided by Section 5272 thereof for non-observance of its provisions; and plaintiffs state that as a direct result of said act, so threatened by defendants, they will be subjected to numerous suits for the purpose of collecting said forfeitures and penalties, and that plaintiffs, their agents and servants, will be subjected to numerous groundless, vexatious, and criminal prosecutions under the provisions of Section 5275 of the aforesaid act of the General Assembly of the State of Missouri, and that plaintiffs will be subjected to a multiplicity of suits, claims, and demands, civil and criminal.

Plaintiffs further state that the aforesaid act of the General Assembly of the State of Missouri, approved May 6, 1931, is unconstitutional, null, and void, and is in conflict with a certain act of the Congress of the United States, known as "Motor Carrier Act, 1935," February 4, 1887,

c 104 Part II pg. 201 as added August 9, 1935 c. 498 Pg. 1 49 Stat.), and is in conflict with various rules and regulations hereinafter referred to, promulgated by the Interstate Commerce Commission, pursuant to authority vested in it under and by virtue of said Motor Carrier Act, 1935, and violates the Constitution of the United States of America, as hereinafter set out, and that defendant is without warrant or authority in law to enforce the provisions of said act and of General Order No. 27 against plaintiffs, and that there is no warrant or authority in law and for said threatened criminal prosecution and said suit to recover forfeitures and penalties, and that without the interposition [fol. 10] of this Honorable Court, plaintiffs will be without relief and their business, property, and goodwill will be injured, impaired, and destroyed, and they will be subjected to harassment and to civil suits and criminal prosecutions to recover fees and penalties provided for in said act of the General Assembly of the State of Missouri and in said General Order No. 27, and that in the circumstances they have no adequate remedy at law.

Plaintiffs state that they operate and use their equipment, herein referred to, within the State of Missouri in interstate commerce, and that the enforcement of said act of the General Assembly of Missouri, and of the provisions of said General Order No. 27 as to them is, and would be, an interference with the rights of the Congress of the United States to regulate commerce among the several states, and constitutes an unreasonable burden upon interstate commerce, and that said act of the General Assembly of the State of Missouri, and said General Order No. 27 are in conflict with the aforesaid Motor Carrier Act, 1935, and with various rules and regulations promulgated by the Interstate Commerce Commission, pursuant thereto, and said enforcement is, and would be, in violation of Section 8, of Article I, of the Constitution of the United States of America.

Plaintiff further states that said Motor Carrier Act, 1935 vests in the Interstate Commerce Commission the regulation of the transportation of passengers or property by motor carriers engaged in interstate commerce and the procurement of and the provision of facilities thereof and imposes on the Interstate Commerce Commission the duty to regulate common carriers by motor vehicle in interstate commerce to the end that said Commission may establish

reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment; authorizes the Commission to establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment; and to administer, execute and en- [fol. 11] force all of the provisions of said Motor Carrier Act, 1935, and to make all necessary orders in connection therewith and to prescribe rules, regulations and procedure for such administration.

Plaintiffs state that at divers times, as hereinafter mentioned, the Interstate Commerce Commission, pursuant to the authority vested in it by said Motor Carrier Act, 1935, has promulgated rules and regulations with reference to the duty and obligation of common carriers in interstate commerce concerning the necessity of providing liability insurance, providing for rules and regulations covering qualifications of employees and safety of operation and equipment of common carriers by motor vehicles, and with reference to various other matters and things relating to the operation of common carriers by motor vehicles in interstate commerce.

Plaintiffs further state that said Motor Carrier Act, 1935, provides that no common carrier by motor vehicle shall engage in any interstate commerce on any public highway without securing a certificate of public convenience and necessity from the Interstate Commerce Commission and that no person shall engage in the business of a contract carrier by motor vehicle in interstate commerce on any public highway without securing a permit issued by the Interstate Commerce Commission authorizing such person to engage in such business and provides rules and regulations for the issuance of such certificates of public convenience and necessity and such permits by the Interstate Commerce Commission and provides that no such certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as to a self-insurer or other securities or agree-

ments, in such reasonable amount as the Commission may require, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others; and further authorizes the Commission in its dis-
[fol. 12] cretion and under such rules and regulations as it shall prescribe, to require any such common carrier to file a surety bond, policies of insurance, qualifications and a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belonging to shippers and/or consignees and coming into the possession of such carrier in connection with its transportation service.

Plaintiff further states that said Motor Carrier Act, 1935 required every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the transportation of property in interstate commerce and to establish, observe, and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation and all matters relating to or connected with the transportation of property in interstate commerce and authorizes the Interstate Commerce Commission to make regulations in connection therewith; and provides for the filing of tariffs, schedules and contracts with the Interstate Commerce Commission and authorizes the Interstate Commerce Commission to require annual, periodical or special reports from all motor carriers and to prescribe the manner and form thereof and provides for the method of service of process upon motor carriers coming within the provision of the Motor Carrier Act, 1935.

Plaintiffs further state that pursuant to the provisions of Section 206 of the said Motor Carrier Act, 1935, providing in the case of carriers in bona fide operation as common carriers by motor vehicle on June 1, 1935, in certain instances, that the Commission should issue such certificates without requiring certain further proof they have applied for and are qualified to receive such certificates of public convenience and necessity to operate as common carriers

in interstate commerce into, from and in the State of Missouri; and plaintiffs state that said Interstate Commerce Commission has the sole and exclusive power to issue certificates of convenience and necessity and to regulate the trans- [fol. 13] portation of property in interstate commerce by motor carrier, and that said act of the General Assembly of the State of Missouri is in conflict with said Motor Carrier Act, 1935, and is unconstitutional and null and void and denies, and to the extent it is enforced by defendants, as now imminently threatened, would deny to the Congress of the United States the right to regulate commerce among the several states, all in violation of Section 8 of Article I of the Constitution of the United States.

That Section 5266 of the said Act of the General Assembly of the State of Missouri, in attempting to regulate charges of motor carriers transporting property in interstate commerce, is in conflict with the various provisions of said Motor Carrier Act, 1935, to-wit, Sections 216, 217, and 218 thereof; that Section 5267 of the Act of the General Assembly of the State of Missouri, and the provisions thereof, attempting to confer on defendant Public Service Commission the power and authority to license, supervise, and regulate motor carriers and to approve rates, charges, classifications, and to promulgate rules and regulations governing such carriers, and prescribing systems of accounting, and providing for filing various reports, are in conflict with said Motor Carrier Act, 1935, and more particularly with Sections 204, 206, 207, 216, 217, and 200 thereof; that Section 5268, and the provisions thereof requiring motor carriers using public highways in the State of Missouri, for the transportation of property in interstate commerce, to secure an interstate permit by applying to defendant Public Service Commission, and authorizing said Commission to regulate the issuance of said permits, is in conflict with Sections 206 and 207 of the Motor Carrier Act, 1935; that Section 5273, requiring motor carriers to file liability insurance policies with defendant Public Service Commission, is in conflict with Section 215 of said Motor Carrier Act, 1935; that Section 5274 of the Act of the General Assembly of the State of Missouri, authorizing defendant Public Service Commission to make such safety rules and regulations for the operation of motor vehicles, as are therein provided for, is in conflict with Section 204 of said Motor Carrier Act, 1935.

[fol. 14] Plaintiffs further state that pursuant to authority

vested in it by the Motor Carrier Act, 1935, the Interstate Commerce Commission has, from time to time, issued and promulgated various rules and regulations governing the operations of motor carriers, and that the rules, regulations, and orders, and the parts of said General Order No. 27 promulgated by the defendant Public Service Commission, are in conflict with said rules and regulations promulgated by the Interstate Commerce Commission in the following particulars, to-wit:

That on or about the 3rd day of August, 1936, the Interstate Commerce Commission promulgated rules with reference to the filing and approval of surety bonds and policies of insurance by motor carriers engaged in interstate commerce; that the provisions of Rule 13 of General Order No. 27, above set out, are in conflict with said rules and regulations of the Interstate Commerce Commission and require other, different, and additional insurance, and make increased demands, placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules of the Interstate Commerce Commission and with said Motor Carrier Act, 1935.

That on the 23rd day of December, 1936, the Interstate Commerce Commission promulgated rules and regulations with reference to lighting requirements, qualifications of employees, and safety of operation and equipment of common carriers engaged in interstate commerce, which rules set forth certain requirements with reference to lights and lighting equipment and devices required for common carriers by motor truck, engaged in interstate commerce; that defendant Public Service Commission, by Rule 52 of said General Order No. 27, provides for other, different, and additional lights, lighting equipment and devices upon motor vehicles engaged as common carriers in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules and regulations of the Interstate Commerce Commission, as aforesaid, and with the Motor Carrier Act, 1935.

[fol. 15] Plaintiff states that the Interstate Commerce Commission, on or about December 23, 1936, promulgated rules and regulations concerning the brakes and braking equipment required of a common carrier by motor vehicle,

engaged in interstate commerce; that defendant Public Service Commission, by Rule 48 of General Order 27, as aforesaid, provides for other, different, and additional brakes, braking equipment, and braking requirements on motor vehicles, so engaged in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules and regulations of the Interstate Commerce Commission, and with the Motor Carrier Act, 1935.

Plaintiffs further state that from time to time the Interstate Commerce Commission has promulgated various regulations to govern the construction and filing of common carrier freight rate and classification publications and supplements thereto, and said Interstate Commerce Commission more particularly did, under date of January 6, 1936, effective January 8, 1936, promulgate such rules and regulations; and, on November 7, 1936, effective January 1, 1937, said Interstate Commerce Commission did issue Supplement No. 1 to the aforesaid regulations.

Plaintiffs further state that defendant Public Service Commission, by Rules 64, 65 and 66 of said General Order 27, provides for other, different, and additional rules and regulations with reference to the construction and filing of common carrier freight rate and classification publications as to motor vehicles, engaged as common carriers in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with the rules and regulations aforesaid of the Interstate Commerce Commission and with the provisions of said Motor Carrier Act, 1935.

That Section 5272 of said act, providing that every motor carrier shall, at the time of the issuance of a certificate of convenience and necessity or an interstate permit, and annually thereafter, pay an annual license fee ranging from [fol. 16] Twenty-five Dollars ($25.00) to Five Hundred Dollars ($500.00), and providing a penalty and forfeiture of Five Hundred Dollars ($500.00) to the State of Missouri, to be collected from any motor carrier using the highways of the State of Missouri in interstate transportation of persons or property, or both, without securing an interstate permit and without paying said license fee and filing a bond

or insurance policy, is unconstitutional and null and void; and that the provisions of said Section 5272, providing that where a motor carrier is operating within this and an adjoining state, and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee otherwise provided for, and providing further that where a motor carrier is operating a route in this state the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee otherwise provided for, is unconstitutional and null and void; that under said Motor Carrier Act, 1935, the Interstate Commerce Commission has the sole and exclusive power to issue permits to motor carriers using the highways of the State of Missouri in the interstate transportation of persons or property or both and of fixing the fees therefor and of providing for the furnishing of bonds and insurance policies by motor carriers in interstate commerce; that said license fees provided for in said Section 5272 are so connected with the issuance of certificates of convenience and necessity and/or interstate permits that the provisions are not separable and that said entire Section 5272 is in conflict with said "Motor Carrier Act, 1935" and is unconstitutional and null and void and denies to the Congress of the United States the right to regulate commerce among the several states in violation of Section 8 of Article I of the Constitution of the United States of America.

That said license fees provided for carriers engaged in interstate commerce, and license fees provided in cases wherein a motor carrier is operating within Missouri and an adjoining state with a total mileage in Missouri of ten miles or less, and providing a license fee where a motor carrier is operating a route in the State of Missouri the total mileage of which is not greater than twenty miles, are unconstitutional, null and void, in that said fees bear no reasonable relation to the use and the extent of the use [fol. 17] of the highways in the State of Missouri by such motor vehicles, and that the fees therein provided for are excessive and grossly excessive and constitute an unreasonable burden on interstate commerce and upon the operations of plaintiffs engaged therein, and that the amount of the fees so provided for is not based upon the amount or the extent of the use of the highways in the State of Missouri, and constitute mere arbitrary charges and burdens upon in-

terstate commerce and against the operations of plaintiffs herein in interstate commerce, all in violation of Section 8 of Article I of the Constitution of the United States.

Plaintiff further states that the provisions of said General Order No. 27 are in conflict with said Motor Carrier Act, 1935 insofar as they relate to the transportation of property in interstate commerce and that by said rules defendant is attempting to regulate the licensing, operation and equipment of motor carriers engaged in interstate commerce in violation of the provisions of said Motor Carrier Act, 1935 and that said regulations are in violation of Section 8 of Article I of the Constitution of the United States and are unconstitutional and void.

Plaintiffs further state that the defendants, unless restrained and enjoined by this Honorable Court, intend to enforce said void and unconstitutional act of the General Assembly of the State of Missouri, and said void and unconstitutional Order No. 27 promulgated pursuant thereto against these plaintiffs, and are threatening to do so forthwith; and that these plaintiffs, their agents, servants, and employees, will be subjected to a multiplicity of groundless civil suits and suits to collect penalties and forfeitures, and that plaintiffs, their agents, servants and employees, will be subjected to numerous and groundless criminal prosecution, and plaintiffs will be harassed in their business and property, and their business, property rights, and goodwill will be impaired, injured, and destroyed, and plaintiffs will suffer immediate and irreparable injury, loss and damage thereto.

Plaintiffs state that they regularly have been, and now are, daily and hourly receiving shipments of property to [fol. 18] be transported into, from and within the State of Missouri in interstate commerce, and that if this Honorable Court does not restrain the action of defendants, as aforesaid, now imminently threatened, plaintiffs will be unable to accept, transport, and deliver such shipments, in accordance with contracts they have entered into and are daily and hourly entering into with respect to said shipments, and will be unable to fulfil the duties and obligations imposed upon them by law as common carriers in interstate commerce with respect thereto, so that they will become liable to numerous losses and suits, claims, and demands by various shippers and consignees in amounts far in excess

as to each plaintiff of the sum of Three Thousand Dollars ($3,000.00), and so that their status as common carriers under the Motor Carrier Act, 1935 will be destroyed by reason of their inability to fulfil said duties as common carriers, as required by said Act, all as a result of the threats and threatened action, as aforesaid, of defendants.

Plaintiffs further state that irreparable loss and damage will result to them unless a temporary restraining order is granted herein before hearing and determination of the application for an interlocutory injunction, hereinafter prayed for, to remain in force and effect until the hearing and determination thereof.

Plaintiffs allege that in view of the foregoing, immediate and irreparable injury, loss, and damage will result to plaintiffs before notice can be served on the defendants herein, and a hearing had thereon, in accordance with the provisions of Section 266 of the Judicial Code of the United States as amended by Act of Congress.

Plaintiffs further respectfully show to the Court that all of said circumstances above enumerated deprive plaintiffs of their property without due process of law, take their property without compensation, and deny to them equal protection of the law, all in violation of their rights under the Constitution of the United States and under Amendments V and XIV thereto, and in violation of their rights under the Constitution of the State of Missouri and of Article II, Sections 4, 21, and 30 thereof.

[fol. 19] Wherefore, the premises considered, Plaintiffs pray this Honorable Court for its order enjoining and restraining defendants from interfering with, stopping, or attempting to interfere with or stop plaintiffs, their agents, servants, and employees, from using the streets and highways of the City of St. Louis and of the State of Missouri in Interstate Commerce, and from interfering with, or attempting to interfere with, plaintiffs in conducting their business of carriage of freight by motor vehicle in interstate commerce into, from, and within the State of Missouri, and from instituting, or causing to be instituted, against plaintiffs any civil action or actions to collect penalties provided for in said Act of the General Assembly of the State of Missouri, and from instituting and prosecuting, or causing to be instituted and prosecuted, any criminal action or actions under said Act; and that defendants be ordered to

show cause why an interlocutory injunction pending the final hearing and determination of this cause should not be issued, and that a temporary restraining order forthwith issue, restraining defendants, as aforesaid, pending hearing and determination of the application for an interlocutory injunction, to remain in force until such hearing and determination; and for such other and further relief as to the Court shall seem meet and proper.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs, 314 No. Broadway, St. Louis.

Duly sworn to by Roy B. Chipps, jurat omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER TO APPEAR FOR HEARING—Filed May 15, 1937

Whereas, in the above-named cause, it has been made to appear, upon the Bill of Complaint, filed herein that a Writ of Injunction preliminary to the final hearing is proper, and that *prima facie* complainants are entitled thereto, enjoining the defendants from the acts complained of, threatened, and about to be committed;

Now, on application of said complainants, it is Ordered that the defendants appear before the Judge of this District Court of the United States for the Central Division of the Western District of Missouri and a Judge of the Circuit Court of the United States, and another District Judge of the United States Court, sitting to hear this matter, at the Court Room of the United States Court at Kansas City, Missouri, and then and there show cause, if any they have, why the interlocutory injunction therein prayed for should not issue, and it appearing to the undersigned District Judge that there is danger of irreparable injury and damage to complainants before the hearing of said application for this interlocutory writ of injunction, unless defendants are, pending such hearing, restrained, as hereinafter set forth;

Therefore, Complainants' application for such restraining order is granted upon its giving bond with good and sufficient surety to be approved by the Clerk of this Court, in the penal sum of Ten Thousand Dollars ($10,000.00), securing the said defendants against all loss or damage

which may result from the issuance of said order, if it should be finally determined that the same shall improperly issue or that it may award to them by reason of the granting of said order;

[fol. 21] Now, Therefore, It is Ordered that the Public Service Commission of the State of Missouri, the Highway Commission of the State of Missouri,—the Honorable Roy McKittrick, Attorney-General of the State of Missouri,—the Honorable B. M. Casteel, Superintendent of the State Highway Patrol,—be, and they are hereby, specifically restrained and enjoined, until further order of this Court from interfering with, stopping, or attempting to interfere with or stop, plaintiffs, their agents, servants, and employes, from using the streets and highways of the City of St. Louis and of the State of Missouri in interstate commerce, and from interfering with, or attempting to interfere with, plaintiffs in conducting their business of carriage of freight by motor vehicle in interstate commerce into, from, and within the State of Missouri, and from instituting, or causing to be instituted, against plaintiffs any civil action or actions to collect penalties provided for in said act of the General Assembly of the State of Missouri, referred to in the complaint filed herein, and from instituting and prosecuting, or causing to be instituted and prosecuted, any criminal action or actions under said act until the further order of the Court;

It Is Further Ordered that a copy of this order, certified under the hand of the Clerk and seal of the Court, be served on each of the defendants to be restrained hereby; and that the hearing of this cause on an application for an interlocutory injunction be had and proceeded with in accordance with Section 266 of the Judicial Code of the United States, as amended by Act of Congress.

Dated at Jefferson City, Missouri, Central Division of the Western Judicial District of Missouri, this 15th day of May, 1937.

J. C. Collet, Judge of the United States District Court for the Western District of Missouri.

Attest: A true copy.

A. L. Arnold, Clerk. By Edna D. Morris, Deputy. (Seal.)

* * * * * * *

[fol. 22] Bond on restraining order for $10,000 approved and filed May 15, 1937, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

STIPULATION OF PARTIES—Filed May 27, 1937

(Adopted by the Court as a modification of Temporary Restraining Order)

Come now the Plaintiffs in the above-entitled cause and the Public Service Commission of Missouri, Defendant in the above-entitled cause, and hereby mutually stipulate and agree that,

Whereas, the Plaintiffs in the above-entitled cause during the Month of April, 1937, paid into the treasury of the State of Missouri, upon emergency travel orders, as provided by the rules and regulations of the Public Service Commission of Missouri, the sum of Seven Thousand One Hundred Seventy-eight and 50/100 Dollars ($7,178.50); and,

Whereas, the Plaintiffs will use the highways of the State of Missouri in the transportation of freight, for hire, and will be liable to the State of Missouri upon Annual License Fees and Emergency Travel Orders from time to time, in the event that the temporary injunction herein is dissolved, upon final hearing of this cause;

It Is Therefore Agreed That the Plaintiffs, and each of the plaintiffs, shall, within ten (10) days from the effective date of the order hereinafter mentioned, file with the Public Service Commission of Missouri and with the Bus and Truck Department of the Public Service Commission of Missouri, a report of each motor vehicle operated over the highways of the State of Missouri in the transportation of freight, in interstate commerce, giving the date, day, complete description, and actual weight carrying capacity of said vehicle, from the 15th day of May, 1937 unto this date, and for each and every day hereafter that this cause may be pending in the courts and undetermined.

Second: It is Further Stipulated and Agreed that each of the plaintiffs herein, and each carrier transporting freight

by motor vehicle over the highways of the State of Missouri in interstate commerce, who may hereafter become a party to this cause, shall file the reports heretofore referred to [fol. 24] from the 15th day of May, 1937 until such time as this suit may be finally determined in this Court or in any Court to which it may be appealed.

Third: It is Further Stipulated and Agreed that each carrier party to this suit shall apply to the Public Service Commission of Missouri for, and the Public Service Commission of Missouri shall have available and furnish, without charge, and keep accurate records thereof, a form of report to be known as "Emergency Travel Orders," in denominations of one to four tons, four to seven tons, seven to nine tons, and over nine tons of weight-carrying capacity of motor vehicle which shall be used, as hereinafter set forth, for each day's operation of vehicles so long as this order may remain in effect, unless and provided said motor vehicle carriers attach thereto an Annual License Card issued by the Commission, signed by the Secretary and attested by the seal of the Commission, to be used as follows:

1. For the purpose of identification, the Commission will cause to be placed on each travel order issued, for use in compliance with this agreement, the words, "Interstate Traffic Only."

2. Travel Orders are not to be furnished free of charge for operation of motor vehicles bearing intrastate freight.

It is Further Agreed that each of the plaintiffs severally is to issue Travel Orders, in triplicate form, for each day's operation of each separate motor vehicle, a day being defined as from 6:00 P. M. to 6:00 P. M. the following calendar day, or from 12:01 A. M. to 12:01 A. M. the following day.

It is Further Agreed that each of the plaintiffs as such motor carriers in interstate commerce only, issuing such Travel Orders, must punch the day, month and year on the margin of the Travel Order so as to indicate the date the use of the Travel Order is to begin, and place thereon the motor number of the truck or tractor used and the serial number of trailers, name of driver, actual weight-carrying

capacity of the vehicle, and other information called for on said Emergency Travel Orders.

It is Further Agreed that the postal card attached to the Emergency Travel Orders, issued by the Public Service Commission of Missouri, shall, by each of the plaintiffs in [fol. 25] said cause, be mailed to the Public Service Commission of Missouri on the date of use. The first duplicate copy is to be carried by the driver on each trip and the original white copy to be kept with the carrier's records. The postal card referred to herein shall be addressed as follows: "Public Service Commission of Missouri, Jefferson City, Missouri."

It is Further Stipulated and Agreed by the parties hereto that defendant Public Service Commission will not issue Travel Orders upon request of plaintiffs herein unless request therefor is accompanied by a certified check, cashier's check, or postal money order, payable to Roy B. Chipps, Trustee, Agent of the Plaintiffs and Interveners, in an amount equal to the amount which but for the restraining order plaintiffs would have had to pay into the treasury of the State of Missouri therefor, and defendant Public Service Commission agrees that periodically it will forward such certified checks, cashier's checks, or postal money orders, so received, to the said Roy B. Chipps, Trustee.

It being specifically understood and agreed that the Public Service Commission does not bind itself or the State of Missouri to be responsible for the collection of these checks, or money orders, or in anywise to be liable for or waive any rights to collect any amount that may be due the State of Missouri upon the final determination of this cause.

It is Hereby Further Agreed that if any one of the plaintiffs, or those who may hereafter be made plaintiffs by order of Court, shall apply to the Public Service Commission of Missouri for an Annual License or Permit without charge, upon the condition the party applying therefor shall deliver to the Public Service Commission his or their cashier's check or postal money order, payable to Roy B. Chipps, Trustee, as herein provided in reference to Emergency Travel Orders, and to be cared for and kept in such manner as provided hereinbefore as to Emergency Travel Orders.

It is Further Stipulated and Agreed that at the discretion of the Court, it may make and enter an order in accordance with the above and foregoing stipulation, that the Court

[fol. 26] may, at its discretion, modify and change the temporary restraining order to conform with this stipulation and the order entered hereunder.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs and Intervenors. Public Service Commission of Missouri, By James P. Boyd, General Counsel, Daniel C. Rogers, Assistant Counsel.

Hannibal, Missouri, May 27, 1937.

ORDER

The temporary restraining order heretofore issued in the above entitled cause is hereby modified by consent of the parties by incorporating the entire above stipulation in said restraining order as a modification thereof.

J. C. Collet, District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PLAZA EXPRESS COMPANY, INC., ET AL., FOR LEAVE TO INTERVENE—Filed May 27, 1937

* * * * * * * *

Come now Plaza Express Company, Inc., a corporation, —Adams Transfer & Storage Company, a corporation,— Tri-state Motor Transport, Inc., a corporation,—Kaiser Truck Service, Inc., a corporation,—M-K Express Com-[fol. 27] pany, a corporation,—Fairy Crest Co., a corporation,—E. H. Hoffman Lines, Inc., a corporation,—Collinsville Transfer Company, a corporation,—Hayes Transfer & Storage Company, a corporation,—Interstate Motor Freight System, a corporation,—Commercial Freight Lines, Inc., a corporation,—Highway Motor Freight Lines, Inc., a corporation,—Acme Truck Lines, Inc., a corporation,—Byers Transportation, Inc., a corporation,—Ed Prange Doing Business as Prange Truck Service,—Everett Wheelock and Fred G. Wheelock Co-partners doing business as Wheelock Brothers,—C. B. Sharp and Ralph Sharp co-partners doing

business as Sharp Truck Lines,—Hugh L. Mitchell, Doing Business as Acme Truck Lines,—Carl A. Klem doing Business as Klem Moving & Storage Company,—L. M. Voss Doing Business as Oklahoma Trucking Exchange,—and Robert Felchia and George Youch Doing Business as Hussman & Roper Truck Service, and state that they are all engaged as common carriers by motor vehicle in the carriage of property in interstate commerce, to, from, and within the State of Missouri.

Petitioners further state that they have an interest in the subject matter of this suit in obtaining relief sought in plaintiffs' Bill, in that they are subjected to the same unlawful treatment and [harrassment] set forth in the Bill of Complaint, and suffer the same irreparable loss and damage, and will continue to do so unless afforded like protection by a restraining order, as issued against defendants in favor of plaintiffs; that because thereof it is indispensable to the preservation of their rights and status that they be permitted to intervene herein and have the benefit of injunctive relief afforded by this Court; that in petitioning herein they do so in subordination to, and in recognition of, the main proceeding.

Petitioners further state that their presence is necessary and proper to a complete, full, and final determination of the cause herein, and to a full, complete, and final preservation of their rights in the premises; that they desire to adopt the allegations in toto of the plaintiffs' bill, and desire to seek the relief sought by plaintiffs, including temporary relief heretofore granted plaintiffs, and desire to be represented by counsel representing plaintiffs, and desire [fol. 28] to contribute to the expenses and costs as plaintiffs, and be bound by the obligations incident to the status of complainants in the case.

Petitioners further state that no damage can inure to defendants by the granting of this petition, inasmuch as they are willing to, and hereby offer, to furnish a surety bond in such reasonable amount as may be ordered by the Court for the protection of defendants, and inasmuch as they are ready and willing to enter into such reasonable stipulations as may be agreed upon with reference to making of daily reports on emergency travel orders, to the end that proper records may be maintained.

Wherefore, the premises considered, Intervenors respectfully pray the Court:

First, to permit them to intervene herein.

Second, Upon filing in this cause of a surety bond in the sum of ..... Thousand Dollars ($.....) that defendants be restrained and enjoined from interfering with their operations as interstate carriers in the State of Missouri as fully and completely as defendants have been restrained and enjoined by order of the Court entered in behalf of plaintiffs in this proceeding.

Third, that they continue as parties to the litigation with the same rights and the same obligations as plaintiffs herein.

And for such other and further orders as to the Court may seem meet and just.

Kenneth Teasdale, B. W. LaTourette, Counsel for Intervenors.

Duly sworn to by Roy B. Chipps. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE TO PLAZA EXPRESS COMPANY, INC., ET AL.—Filed May 27, 1937

This cause coming on to be heard on the application of Plaza Express Company, Inc. (A Corporation), Adams Transfer & Storage Company (A Corporation), Tri-State Motor Transport, Inc., (A Corporation), Kaiser Truck Service, Inc. (A Corporation), M-K Express Company (A Corporation), Fairy Crest Co. (A Corporation), E. H. Hoffman Lines, Inc. (A Corporation), Collinsville Transfer Company (A Corporation), Hayes Transfer & Storage Company (A Corporation), Interstate Motor Freight System (A Corporation), Commercial Freight Lines, Inc. (A Corporation), Highway Motor Freight Lines, Inc. (A Corporation), Acme Truck Lines, Inc. (A Corporation), Byers Transportation, Inc. (A Corporation), Ed Prange Doing Business As Prange Truck Service, Everett Wheelock and

Fred G. Wheelock Co-Partners Doing Business As Wheelock [fols. 30-31] Brothers, C. B. Sharp and Ralph Sharp Co-Partners Doing Business As Sharp Truck Lines, Hugh L. Mitchell Doing Business As Acme Truck Lines, Carl A. Klem Doing Business As Klem Moving & Storage Company, L. M. Voss Doing Business As Oklahoma Trucking Exchange, And Robert Felchia And George Youch Doing Business As Hussman & Roper Truck Service, Interveners in this suit to be made parties, and the petition having been duly considered, and it appearing to the Court that said Petitioners have an interest in the subject matter sufficient to enable them to become parties to this suit; It Is Therefore

Ordered, Adjudged, and Decreed that said Petitioners are hereby granted leave to intervene and become parties herein.

It is Further Ordered, Adjudged, and Decreed, upon said parties filing herein a bond in the sum of Twenty Thousand Dollars ($20,000.00), that the provisions of the Restraining order, entered herein on or about May 15, 1937, enjoining defendants from interfering with the operations of Plaintiffs as interstate carriers in the State of Missouri, shall extend to them, and for their benefit, as fully and completely as if they had been plaintiffs herein at the time of the filing of this suit.

J. C. Collet, Judge of the District Court of the United States for the Central Division of the Western Judicial District of Missouri.

Dated at Hannibal this 27 day of May, 1937.

Bond on intervention for $20,000.00 filed Sept. 8, 1937, omitted in printing.

[fol. 32] IN UNITED STATES DISTRICT COURT

DEFENDANTS' JOINT ANSWER—Filed September 17, 1937

Come now Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, defendants in the above entitled cause, and for their joint answer to plaintiffs' Bill in equity respectfully state as follows:

Defendants admit the corporate and individual existence of plaintiffs as pleaded in said Bill, and further admit that

each of them is engaged in the transportation of property for hire in interstate commerce as a common carrier.

Defendants admit that the Public Service Commission of the State of Missouri is a legal entity created and established under the laws of the State of Missouri and as such is capable of suing and being sued in its official name, and admit that its principal offices are at Jefferson City, Missouri; and further admit that defendant Public Service Commission is vested with authority and jurisdiction under the laws of Missouri to supervise and regulate all motor carriers operating or doing business within the State of Missouri.

Defendants admit that the State Highway Commission of the State of Missouri is a legal entity created and established by virtue of the laws of the State of Missouri and as such is authorized to sue and be sued in its official name; and admit that defendant State Highway Commission has supervision of highways and bridges which are constructed, improved and maintained in the State of Missouri.

Defendants admit that the State Highway Commission has direction of and supervision over the Missouri State Highway Patrol, and further admit that the Missouri State Highway Patrol is authorized by the laws of the State of Missouri to patrol the public highways constructed and maintained by the aforesaid Highway Commission of Missouri, and that said patrol is authorized and empowered to [fol. 33] regulate the movements of traffic upon the public highways of Missouri and to enforce thereon the laws of the State of Missouri relating to the operation and use of vehicles on the highways thereof, and to enforce and prevent violation of all laws with reference to the use of said highways; and admit that defendant B. M. Casteel is Superintendent of the State Highway Patrol, and, as such, has command of same and directs its activities.

Defendants admit that the Honorable Roy McKittrick is the duly elected, qualified, and acting Attorney General of the State of Missouri, and, as such, is charged with the duty of enforcing the laws thereof, and is a citizen and resident of the State of Missouri, and resident within the Central Division of the Western Judicial District of Missouri.

Defendants admit that each of the defendants was, at all times herein mentioned, and still is, a resident and citizen of the State of Missouri, and of the Central Division of the Western Judicial District of Missouri.

Defendants admit that the matter in controversy exceeds as to each plaintiff, the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Defendants admit that each of the plaintiffs is a motor carrier engaged in the business of carrying property for hire in interstate commerce over the public highways of the State of Missouri, Illinois and of other states and that each of the plaintiffs has invested in equipment and in good will in said business large sums of money, and further admit that plaintiffs severally own and operate fleets of motor trucks carrying property for hire in interstate commerce upon and over the public highways of the State of Missouri.

Defendants admit that the Fifty-Sixth General Assembly of Missouri enacted a certain act, approved on May 6, 1931, and entitled, "An Act To Repeal Article VIII of Chapter 33 of the Revised Statutes of Missouri, 1929," entitled "Transportation of Persons By Motor Vehicles," and enacted in lieu thereof a new article containing seven-
[fol. 34] teen sections, numbers 5264 to 5280, both inclusive, and further admit that said seventeen new sections as enacted constitute and are known as Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and admit that said new Article VIII provides for the supervision, regulation and licensing of the transportation of persons and property for hire over and upon the public highways of the State of Missouri by motor vehicles, and admit that said new Article VIII confers jurisdiction upon the Public Service Commission to license, regulate and supervise such motor carrier transportation, and provides for the enforcement of the provisions of said Article VIII, and for the punishment for violation thereof.

Defendants admit that under date of September 14, 1931, defendant Public Service Commission duly promulgated rules and regulations under the aforesaid new Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and adopted and approved them in a certain general order known as General Order No. 27 of said Public Service Commission, and admit that said General Order No. 27 became effective on September 15, 1931, and admit that each and every rule pleaded on pages seven to twenty-two, both inclusive, of plaintiffs' Bill were duly promulgated by defendant Public Service Commission and became effective as

aforesaid. Defendants allege, however, that the rules promulgated by defendant Public Service Commission in General Order No. 27, on September 14, 1931, have from time to time been amended, canceled and superseded, and allege that General Order No. 27-A, which was duly promulgated and became effective on April 1, 1937, a copy of which, marked Exhibit A, is filed herewith and made a part hereof, contains all of the present rules and regulations of defendant Public Service Commission promulgated under authority of the aforesaid new Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and amendments thereto; and allege that the rules and regulations contained in said General Order No. 27-A, being Exhibit A hereto attached and made a part hereof, were in full force and effect at the time plaintiffs filed their Bill and have been in full force and effect since that time.

Defendants admit that it is their duty to enforce, and that they intend to enforce, the aforesaid Article VIII of [fol. 35] Chapter 33, Revised Statutes of Missouri, 1929, and the rules and regulations of the Public Service Commission promulgated thereunder in General Order No. 27-A, and admit that such intention to require plaintiffs, and each of them to comply with the aforesaid Missouri Statutes and the rules and regulations promulgated thereunder has been communicated to plaintiffs, and each of them. Defendants deny that they have communicated to plaintiffs, or any of them, any intention affirmatively to bar or prohibit them from entering the State of Missouri or from engaging in interstate commerce therein. Defendants deny that in the enforcement of the aforesaid Missouri statutes against plaintiffs they, their agents or servants will be subjected to numerous groundless, vexatious and criminal prosecutions under the provisions of Section 5275, or under any other section or sections of the aforesaid Act of the General Assembly of the State of Missouri, and deny that plaintiffs will be illegally or unjustly subjected to a multiplicity of suits, claims and demands, civil and criminal.

Defendants deny that the aforesaid Act of the General Assembly of the State of Missouri, approved May 6, 1931, appearing at page 304 of the Laws of Missouri, 1931, is unconstitutional, null and void and is in conflict with the Federal Motor Carrier Act of 1935, and deny that the aforesaid Missouri Act is in conflict with or has been

superseded by any of the rules and regulations promulgated by the Interstate Commerce Commission pursuant to the authority vested in it under and by virtue of the aforesaid Federal Motor Carrier Act of 1935, and deny that the aforesaid Missouri Act violates the Constitution of the United States of America, and deny that they are without warrant or authority in law to enforce the aforesaid Missouri Act against plaintiffs, and each of them; and deny that, unless this Honorable Court extends equitable relief to plaintiffs, they will be without relief, and further deny that plaintiff's business, property and good will will be injured, impaired and destroyed, and further deny that in the authorized enforcement of the aforesaid Missouri Act, and the rules and regulations of the Public Service Commission promulgated thereunder, against plaintiffs they will be subjected to unjust or illegal harassment either [fol. 36] by criminal prosecutions or by proper civil action to recover the common carrier fees provided by the aforesaid Missouri Act for the use of the public highways of the State of Missouri by motor carriers, both interstate and intrastate; and deny that plaintiffs have no adequate remedy at law to protect themselves in the event suits, civil or criminal, are brought against them for non-compliance with the aforesaid Missouri law.

Defendants admit that plaintiffs operate and use their equipment, as pleaded in their Bill, within the State of Missouri in interstate commerce, but deny that the enforcement of the aforesaid Act of the General Assembly of Missouri, and of the rules and regulations of the Public Service Commission promulgated thereunder by General Order No. 27-A, constitutes an interference with the rights of the Congress of the United States to regulate commerce among the several states, and deny that enforcement of the aforesaid Missouri Act constitutes an unreasonable burden upon interstate commerce, and deny that the aforesaid Missouri Act, and the rules and regulations of the Missouri Public Service Commission promulgated thereunder in General Order No. 27-A are in conflict with the Federal Motor Carrier Act, 1935, or in conflict with the various rules and regulations promulgated by the Interstate Commerce Commission pursuant to said Federal Motor Carrier Act, and deny that the enforcement of the aforesaid Missouri Act is and would be in violation of

Section 8 of Article I of the Constitution of the United States of America.

Defendants admit that the aforesaid Federal Motor Carrier Act of 1935 vests in the Interstate Commerce Commission the regulation of the transportation of passengers or property by motor carriers engaged in interstate commerce and admit that said Federal Act imposes upon the Interstate Commerce Commission the duty to regulate common carriers by motor vehicle in interstate commerce to the end that said Interstate Commerce Commission may establish, promulgate and prescribe reasonable rules, regulations and procedure for the effective administration of said Federal Motor Carrier Act. Defendants admit that at divers times the Interstate Commerce Commission, pursuant to the aforesaid Federal Motor Carrier Act of 1935, [fol. 37] has promulgated rules and regulations with reference to the duty and obligation of common carriers in interstate commerce concerning the necessity of providing liability insurance, and providing for rules and regulations for qualifications of employees and for safety of operation and equipment of common carriers by motor vehicles, and with reference to various other matters and things relating to the operation of common carriers by motor vehicles in interstate commerce. Defendants allege, however, that it is the duty of the plaintiffs to plead specifically each and every rule of the Interstate Commerce Commission promulgated under authority of the Federal Motor Carrier Act of 1935, which they contend have superseded the aforesaid Missouri Act and the rules and regulations of the Public Service Commission promulgated thereunder, or which they contend are in conflict with the aforesaid Missouri Act or rules and regulations of the Public Service Commission.

Defendants admit that under the provisions of the Federal Motor Carrier Act of 1935 the Interstate Commerce Commission has the sole and exclusive power to issue certificates of convenience and necessity to motor carriers desiring to conduct a transportation business in interstate commerce; deny that the aforesaid Act of the General Assembly of Missouri is in any respect in conflict with said Federal Motor Carrier Act of 1935; deny that it is unconstitutional, null and void; deny that by the enforcement of the aforesaid Missouri Act the Congress of the

United States would be deprived of the right to regulate commerce among the several states, and deny that the enforcement of the aforesaid Missouri Act is, or would be in violation of, Section 8 of Article I of the Constitution of the United States.

Defendants deny that Section 5266 of the aforesaid Act of the General Assembly of the State of Missouri in providing for a schedule of fees to be paid by all motor carriers, interstate and intrastate, who use the public highways of Missouri, is in conflict with any of the provisions of the aforesaid Federal Motor Carrier Act of 1935; deny that the provisions of the aforesaid Missouri Act, which confers upon the defendant Public Service Commission the power and authority to license, supervise and regu- [fol. 38] late motor carriers and to approve rates, charges and classifications, and to promulgate rules and regulations governing such carriers, and prescribing systems of accounting and providing for filing various reports, are in conflict with any of the provisions of the aforesaid Federal Motor Carrier Act of 1935; deny that Section 5268 of the aforesaid Missouri Act, requiring motor carriers using the public highways in the State of Missouri for the transportation of property in interstate commerce, to secure an interstate permit from defendant, is in conflict with Sections 206 and 207 of the Federal Motor Carrier Act of 1935; deny that Section 5273 of the aforesaid Missouri Act, requiring motor carriers to file liability insurance policies with defendant Public Service Commission, is in conflict with Section 215 of the aforesaid Federal Motor Carrier Act of 1935; deny that Section 5274 of the aforesaid Missouri Act authorizing defendant Public Service Commission to make safety rules and regulations for the operation of motor vehicles upon and over the public highways of Missouri, is in conflict with Section 204, or in conflict with any other section, of said Federal Motor Carrier Act of 1935.

Defendants admit that on or about August 3, 1936, the Interstate Commerce Commission promulgated rules with reference to the filing and approval of surety bonds and policies of insurance by motor carriers engaged in interstate commerce, but defendants deny that any of the provisions of the aforesaid Missouri statutes or of the rules of the Public Service Commission promulgated thereunder, as contained in defendant's General Order No. 27-A, marked Exhibit A, filed herewith and made a part hereof,

are in conflict with the aforesaid rules and regulations of the Interstate Commerce Commission pertaining to surety bonds and policies of insurance, and deny that the aforesaid Missouri Act or the rules of the Public Service Commission promulgated thereunder with reference to surety bonds and insurance policies imposes increased demands or unreasonable burdens upon plaintiffs or upon their operations as motor carriers in interstate commerce.

Defendants admit that on or about December 23, 1936, the Interstate Commerce Commission promulgated rules and regulations with reference to lighting requirements, [fol. 39] qualifications of employees, safety of operation in equipment of common carriers engaged in interstate commerce, but deny that any of the rules and regulations promulgated by the Public Service Commission of Missouri under authority of the aforesaid Missouri statute imposes increased demands or places unreasonable burdens upon plaintiffs and upon their operations as motor carriers in interstate commerce.

Defendants admit that on or about December 23, 1936, the Interstate Commerce Commission promulgated rules and regulations concerning brakes and braking equipment required of common carriers by motor vehicle engaged in interstate commerce, but deny that any of the rules and regulations of the Public Service Commission promulgated under the aforesaid Missouri statute impose increased demands or place unreasonable burdens upon plaintiffs and upon their operations as motor carriers in interstate commerce.

Defendants admit that the Interstate Commerce Commission has promulgated regulations governing the construction and filing of common carrier freight rate and classification publications, and supplements thereto, and particularly admit that the Interstate Commerce Commission did, under date of January 6, 1936, effective January 8, 1936, promulgate such rules and regulations, and did on November 7, 1936, effective January 1, 1937, issue Supplement No. 1 to the aforesaid regulations. Defendants deny, however, that any of the rules and regulations of defendant Public Service Commission of Missouri, promulgated under its General Order No. 27-A, impose increased demands or place unreasonable burdens upon plaintiffs or upon their operations as common carriers in interstate commerce.

Defendants admit that Section 5272 of the aforesaid Missouri Act provides that every motor carrier, whether operating in interstate or intrastate commerce, shall, at the time of the issuance of a certificate of convenience and necessity for operation in intrastate commerce, or at the time of the issuance of an interstate permit for operation in interstate commerce, and annually thereafter, pay an annual license fee ranging from Twenty-Five Dollars [fol. 40] ($25.00) to Five Hundred Dollars ($500.00), for the maintenance and repair of the public highways of Missouri; admit that said section provides a penalty and forfeiture of ($500.00) Five Hundred Dollars to the State of Missouri to be collected from any motor carrier using the highways of the State of Missouri in interstate transportation without securing an interstate permit and without paying the prescribed license fees for the use of the public highways of the State of Missouri, and admit that the aforesaid penalty and forfeiture similarly applies against interstate common carriers who operate over the public highways of the State of Missouri without securing a bond or insurance policy as prescribed in the aforesaid Missouri Act. Defendants deny that Section 5272, or any part thereof, of the aforesaid Missouri Act is null and void. Defendants further admit that Section 5272 of the aforesaid Missouri Act provides that where a motor carrier is operating within Missouri and an adjoining state and the total mileage of its operations upon and over the public highways of the State of Missouri is ten miles or less, the annual license fee shall be one-third of the annual license fee regularly provided for; admit that said section further provides that where a motor carrier is operating a route in this State, the total mileage of which is not greater than twenty miles, the annual license fee shall be one-half of the annual license fee regularly provided for. Defendants deny that the Interstate Commerce Commission has the sole and exclusive power to issue permits to motor carriers using the public highways in interstate transportation of persons or property, or both, and deny that the Interstate Commerce Commission has any authority whatsoever to fix the fees for the use of the public highways of Missouri in interstate commerce; deny that the Interstate Commerce Commission has the sole and exclusive power to require and regulate the furnish-

ing of bonds and insurance policies by motor carriers using the public highways of the State of Missouri in interstate commerce; deny that the license fees provided in Section 5272 of the aforesaid Missouri Act for the use of the public highways of the State of Missouri are so connected with the issuance of certificates of convenience and necessity and/or interstate permits that the provisions are not separable; deny that said entire Section 5272 is in con- [fol. 41] flict with the Federal Motor Carrier Act of 1935; deny that said Section 5272 is unconstitutional, null and void and deprives the Congress of the United States of the right to regulate commerce among the several states, and deny that said Section 5272 is in violation of Section 8 of Article I of the Constitution of the United States. Defendants deny that the aforesaid Missouri Act confers upon defendant Public Service Commission the power to issue certificates of convenience and necessity to motor carriers for authority to engage in interstate commerce, and deny that defendant Public Service Commission has ever presumed to require motor carriers engaged exclusively in interstate commerce to make application to defendant Public Service Commission for certificates of convenience and necessity. Defendants admit that the exclusive authority to issue certificates of convenience and necessity to interstate motor carriers is vested in the Interstate Commerce Commission. Defendants deny that the issuance of interstate permits, only for the purpose of identifying interstate motor carriers in the enforcement of the state police powers, is in conflict with the Federal Motor Carrier Act of 1935, and deny that the issuance of said interstate permits is unconstitutional or is in conflict with any of the provisions of the Constitution of the United States.

Defendants deny that the license fees provided in the aforesaid Missouri Act for motor carriers engaged in interstate commerce, and the license fees provided in cases where an interstate motor carrier is operating within Missouri and an adjoining state with a total mileage over the public highways of Missouri of ten miles or less, and the license fees in cases where a motor carrier is operating over the public highways of the State of Missouri in interstate commerce a total mileage not in excess of twenty miles, are unconstitutional, null and void; deny that said fees bear no

reasonable relation to the use and the extent of the use of the public highways in the State of Missouri by such interstate motor carriers; deny that the fees therein provided for are excessive and grossly excessive; deny that said fees constitute an unreasonable burden on interstate commerce or upon the operations of plaintiffs engaged in interstate commerce; deny that the amount of the fees so provided for [fol. 42] is not based upon the amount or the extent of the use of public highways in the State of Missouri; deny that said fees constitute mere arbitrary charges and burdens upon interstate commerce and against the operations of plaintiffs in interstate commerce, and deny that the fees so imposed upon plaintiffs are in violation of Section 8 of Article I of the Constitution of the United States.

Defendants deny that the provisions of the aforesaid Missouri Act or of the duly promulgated rules and regulations of the Public Service Commission thereunder are in conflict with the Federal Motor Carrier Act of 1935, insofar as said Missouri Act or said rules and regulations relate to the transportation of property in interstate commerce, and deny that by the application of said rules against interstate motor carriers defendant Public Service Commission is violating the provisions of said Federal Motor Carrier Act or the rules and regulations of the Interstate Commerce Commission promulgated thereunder, or Section 8 of Article I of the Constitution of the United States.

Defendants admit that, as heretofore pleaded, they intend to enforce the provisions of the aforesaid Missouri Act, and the duly promulgated rules of the Public Service Commission thereunder against the plaintiffs, their servants, agents and employees, in accordance with their respective authorities so to do, but deny that plaintiffs, their agents, servants and employees, in the enforcement of the aforesaid Missouri Act, will be subjected to a multiplicity of groundless civil suits and suits to collect penalties and forfeitures, and deny that plaintiffs, their agents, servants and employees will be subjected to numerous and groundless criminal prosecutions, and deny that plaintiffs will be harassed in their business and property, and deny that their business rights, property rights and good will will be impaired, injured and destroyed, and deny that plaintiffs will suffer immediate and irreparable injury, loss and damage.

Defendants admit that plaintiffs, and each of them, for a long time have been, and are now, daily and hourly,

receiving shipments of property to be transported into, from [fol. 43] and within the State of Missouri in interstate commerce, but deny that the enforcement of the aforesaid Missouri Act against plaintiffs will impair their right to accept, transport and deliver shipments in interstate commerce, and deny that plaintiffs will be impaired in their ability to fulfill the duties and obligations imposed upon them by law as common carriers in interstate commerce to the extent that they will become liable to numerous losses and suits, claims, and demands by various shippers and consignees in amounts far in excess, as to each plaintiff, of the sum of Three Thousand Dollars ($3,000.00), and deny that the enforcement of the aforesaid Missouri Act against plaintiffs, or any of them, will impair their status as common carriers under the Federal Motor Carrier Act of 1935.

Defendants deny that irreparable loss and damage will result to plaintiffs unless a temporary restraining order is granted herein, and deny that irreparable loss and damage will result to plaintiffs unless an interlocutory injunction is granted.

Defendants deny that the enforcement of the aforesaid Missouri Act against plaintiffs will deprive them of their property without due process of law, take their property without compensation, and deny to them the equal protection of the law, and deny that the enforcement of the aforesaid Missouri Act against plaintiffs will deprive them of their rights under Amendments 5 and 14 of the Constitution of the United States of America, and deny that the enforcement of the aforesaid Missouri Act against plaintiffs will violate their rights under the Constitution of the State of Missouri, particularly under Article II, Sections 4, 21 and 30 thereof.

Wherefore, defendants, and each of them, pray this Court to dismiss the Bill of Complaint, and for such other equitable relief as to this Court may seem just and proper.

Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, Roy McKittrick, Attorney Gen- [fol. 44] eral of the State of Missouri, Defendants, by James P. Boyd, General Counsel, Public Service Commission of the State of Missouri. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

COUNTERCLAIM

Defendant Public Service Commission having answered plaintiffs' Bill of Complaint does by this its separate counterclaim complain against the plaintiffs hereinafter named, and alleges as follows:

(1) In their sworn Bill of Complaint plaintiffs have alleged that they are operators of motor vehicles using the public highways of the State of Missouri in interstate commerce, but, notwithstanding, certain of said plaintiffs, who are hereinafter named, have wholly failed to pay to the Treasurer of the State of Missouri the license fees, as set out in the aforesaid Article VIII, Chapter 33, Revised Statutes of Missouri, being known as the Missouri Bus and Truck Act, enacted by the Fifty-sixth General Assembly of the State of Missouri, appearing at pages 304-316, both inclusive, of the Laws of Missouri, 1931, and amendments thereto. Defendant Public Service Commission alleges that at all times, during the more than six years since the effective date of the aforesaid Missouri Bus and Truck Act, plaintiffs hereinafter mentioned have neglected, failed and refused to pay to the State of Missouri the license fees provided by the aforesaid Missouri Bus and Truck Act.

(2) The failure and refusal of said plaintiffs to pay said license fees was wilful and unlawful and was done for the purpose of defrauding the State of Missouri of said license fees. Because of the fact that most of said plaintiffs are non-residents of the State of Missouri, process cannot be served upon them in this State unless they maintain offices for the transaction of business in Missouri or can be found [fol. 45] here. Neither the courts of the sister states nor the United States courts located in such states have jurisdiction to entertain suits brought by the State of Missouri or its officers for the purpose of recovering the aforesaid license fees.

(3) Public Service Commission is without specific knowledge as to the number of vehicles which plaintiffs hereinafter mentioned have operated upon and over the public highways of the State of Missouri in interstate commerce since the aforesaid Missouri Bus and Truck Act became effective on or about September 15, 1931. Neither does defendant Public Service Commission know the actual

weight carrying capacity in tons of said vehicles. All of said facts are within the knowledge of said plaintiffs.

(4) The amounts due and payable in license fees as aforesaid are not unliquidated, but are liquidated, definite and certain sums which could be accurately determined upon a proper accounting. Although such account could be accurately stated, if the facts were at hand, the taking of said account would be long and complicated.

(5) Because of the premises, defendant Public Service Commission is without an adequate or efficient remedy at law and, therefore, brings this counterclaim in equity.

(6) Wherefore, said defendant Public Service Commission prays as follows:

(a) That this Court will take jurisdiction of said counterclaim in equity.

(b) That upon a full hearing the Court will enter a decree or decrees for the amount of said license fees due to the State of Missouri from the following plaintiffs, respectively:

Acme Truck Lines, Inc.
Collinsville Transfer Company
Dohrn Transfer Company
Egyptian Express
Fairy Crest Co.
Robert Felchia and George Youch, D/B/A Hussman & Roper Truck Service
E. F. Frey Company
[fol. 46] Hayes Freight Lines, Inc.
Hayes Transfer & Storage Company
E. H. Hoffman Lines, Inc.
Hussman & Roper Freight Lines, Inc.
Interstate Dispatch, Inc.
Interstate Motor Freight System
Kern, Inc.
Carl A. Klem, D/B/A Klem Moving & Storage Company
Lucido Bros. Grocery Company, Inc.
Midland Truck Line, Inc.
Night Hawk, Inc.
Ed Prange D/B/A Prange Truck Service
Robinson Motor Lines
R. A. Sand, D/B/A Sand Motor Express

Schwartz Truck Terminal
Service Lines, Inc.
William Shadalov, Doing Business as Overnight Freight Service
C. B. Sharp and Ralph Sharp, D/B. A Sharp Truck Lines
St. Louis Eastern Truck Lines, Inc.
St. Louis Forwarding Company
Western Trucking Company, Inc.
Wilson Truck Company

(c) That the Court, after a full hearing, shall dismiss the Bill of Complaint for want of equity.

(d) That the Court shall grant any other equitable relief which it may deem just and proper.

Public Service Commission of the State of Missouri, by James P. Boyd, General Counsel, Daniel C. Rogers, Assistant Counsel, Solicitors.

IN UNITED STATES DISTRICT COURT

GENERAL DENIAL OF PLAINTIFFS TO COUNTERCLAIM—Filed September 22, 1937

Come now plaintiffs referred to in Counter Claim of defendant Public Service Commission of the State of Missouri, and for their Answer to said Counter Claim deny [fol. 47] each and every allegation, statement and thing therein contained.

Wherefore, having fully answered, plaintiffs pray to go hence with their costs.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' SUPPLEMENTARY ANSWER—Filed January 31, 1938

Come now defendants and file this, their supplementary answer to plaintiffs' Bill in Equity, and for their supplementary answer state that defendant Public Service Com-

mission at a session of said Commission held in its office in Jefferson City, Missouri on the 15th day of November, 1937, pursuant to the authority vested in said Commission by the Missouri Bus and Truck Law, approved May 6, 1931 and found on pages 304 to 316, inclusive, of Laws of Missouri 1931, with amendments thereto, did promulgate certain rules and regulations governing the operation of motor carriers and contract haulers in the transportation of persons or property for hire by motor vehicles upon and over the public highways of the State of Missouri; that said rules are numbered as Rules Nos. 1 to 71, inclusive; that said rules numbered 1 to 71, inclusive, as thusly promulgated are known as General Order No. 33; that said General Order No. 33 containing the aforesaid rules numbered 1 to 71, inclusive, together with the aforesaid Missouri Bus and Truck Act are hereto attached and made a part hereof, as defendants Exhibit B.

Defendants further state that the aforesaid General Order No. 33 became effective on the first day of January, 1938, and is now in full force and effect, except as hereinafter stated, and as provided by the terms of said General Order No. 33 Rules Nos. 1 to 71, inclusive, thereof supersede, cancel and annul all previous general orders, rules and regulations promulgated by defendant Public Service Commission under authority of the aforesaid Missouri Bus and Truck Law.

[fol. 48] Defendants state that on the 29th day of December, 1937, defendant Public Service Commission made an order, which became effective on the first day of January, 1938, wherein Rule No. 23 of General Order No. 33, attached hereto in printed pamphlet form and made a part hereof, was suspended and the effective date thereof postponed until a public hearing thereon can be held before defendant Public Service Commission; that Rule No. 14-B of General Order No. 27-A, which became effective on April 1, 1937, was by the aforesaid recent order of the Public Service Commission, effective January 1, 1938, substituted for and in the place of Rule No. 23 as same now appears in General Order No. 33; that said Rule No. 14-B is now in full force and effect.

Defendants further state that Public Service Commission by another order effective on the first day of January, 1938 duly amended Rule No. 51 as contained in General Order

No. 33, attached hereto in printed pamphlet form and made a part hereof; by striking out of paragraph (a) of said Rule No. 51, pertaining to working hours of employees, the word "continuously"; that paragraph (a) of said Rule No. 51 of General Order No. 33 was amended to read as follows:

"No motor carrier controlling, operating or managing any motor vehicle used in the transportation of passengers or property shall cause or allow any driver or operator of such motor vehicle to work as a driver or operator for a longer period than ten hours and whenever any such driver or operator shall have been on duty driving or operating for ten hours, he shall be relieved and not required or permitted again to go on duty driving or operating until he has had at least 10 consecutive hours off duty, also that in cases of unforeseen emergency a driver may remain on duty not in excess of twelve hours."

Defendants state that the aforesaid Rules Nos. 1 to 71, inclusive, of General Order No. 33, attached hereto in printed pamphlet form and made a part hereof, with amendments mentioned, are not in conflict with the rules and regulations promulgated by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act of 1935, and state that the aforesaid Missouri rules are [fol. 49] not superseded by any rules promulgated by the Interstate Commerce Commission; that said Missouri rules are in full harmony with similar rules promulgated by the Interstate Commerce Commission; that the Missouri rules do not constitute a burden upon interstate commerce, and further state that the Missouri rules are not unconstitutional, null and void as pleaded by plaintiffs in their Bill.

Public Service Commission of the State of Missouri; Highway Commission of the State of Missouri; B. M. Casteel, Superintendent of Missouri State Highway Patrol; Roy McKittrick, Attorney General of the State of Missouri, Defendants, by James P. Boyd, General Counsel, Public Service Commission of the State of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

IN UNITED STATES DISTRICT COURT

OPINION HANDED DOWN JUNE 15, 1938—Filed June 15, 1938

Per CURIAM:

Action to restrain state agencies from enforcing the Missouri Bus and Truck Law and particularly Section 5272, Revised Statutes of Missouri, 1929, as amended by Laws Mo. 1931, page 311.

Plaintiffs are interstate motor carriers. By Sec. 5272, supra, all common carriers of freight for hire by motor vehicles having a weight-carrying capacity of more than one and one-half tons are required to pay an annual license fee to the State of Missouri. The amount of the fees increase progressively as follows:

[fol. 50]

More than 1½ and not more than 2 tons	$25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00
More than 7 and not more than 8 tons	275.00
More than 8 and not more than 9 tons	350.00
More than 9 tons	500.00

These fees apply alike to interstate and intrastate carriers. In addition to these fees which apply only to trucks operated as common carriers for hire, a tax characterized as a registration fee is levied upon all trucks and passenger vehicles whether used for private or commercial purposes. Section 5272 also provides that an interstate carrier which is operating over a route ten miles or less of which is in Missouri, shall be required to pay only one-third of the above fees, and if such route be twenty miles or less the fee is one-half the above amount.

Plaintiffs concede that the State of Missouri has the power to levy and collect compensatory fees from interstate motor carriers without transgressing the Commerce clause of the Constitution, but attack the Missouri Statute upon the grounds that the fees fixed are (a) unreasonable and discriminatory and (b) inoperative by reason of the fact

that Congress has taken over the regulation of interstate motor carriers by the enactment of the Motor Carrier Act of 1935.

In support of the charge that the fees are unreasonable and excessive, plaintiffs offered evidence to the effect that the typical type of concrete highway in Missouri is the lightest and cheapest type practical for use by passenger vehicles and hence no part of the original cost of the highways should be charged to trucks in determining the amount of fees all trucks should pay in order to recompense the state for the cost to the state of the use of its highways by trucks. Evidence was also offered tending to show that high type roads of the type of Missouri highways do not depreciate from traffic of no greater weight than the statutory load limits, but only depreciate from the combined effect of traffic and natural forces. It is asserted arguendo [fol. 51] that no depreciation should be allocated to truck traffic.

Both of the above arguments are based upon the assumed but unsupported false premise that since the highways were constructed primarily for uses other than truck traffic and therefore would have been constructed of the same type regardless of whether trucks might thereafter use them, upon the advent of the use of the highways by trucks there could be no allocation of any part of the original cost to truck traffic. Several fallacies are involved in that reasoning. Among them is the false assumption that the state constructed its highways for the purpose of accommodating any one or more specific classes of traffic. Although an expressed declaration to that effect is probably unnecessary to so classify them, the Missouri highways are expressly declared to be public highways and hence open from their establishment and construction to all proper uses and by all classes of the traveling public. Again, plaintiffs' argument seems to assume that truck traffic was either non-existent or its existence ignored by the state in the consideration of the necessity or advisability of the construction of the present highway system. There is no basis for either assumption. The hypothesis is inaccurate for the further reason that it assumes that the state has no right to anticipate new uses of its highway facilities which will share the burden of construction, depreciation, and maintenance. For these reasons and possibly many others, plaintiffs' contention that no part of the original cost or

depreciation of the highways may be properly considered in determining the reasonableness of the amount of the fees charged is untenable.

The argument and supporting evidence is presented to the effect that maintenance costs are not increased by heavy truck traffic. Neither the argument or the evidence is convincing when the plaintiffs also advance the theory that the extent of depreciation from motor vehicles is in direct proportion to total mileage and the weight of the vehicle. Although a distinction be recognized between depreciation and maintenance, yet it does not appear logical that the weight of a truck may be a factor in causing depreciation [fol. 52] and not be a factor in creating maintenance expenses.

The further contention is made that the maintenance expense of the entire highway system should not be included in determining the maintenance expense chargeable to plaintiffs when plaintiffs only use a comparatively small percentage of the whole. Plaintiffs have the burden of showing the unreasonableness of the fee and a fortiori the burden is upon them to show the unreasonableness and injury of the method used in determining the amount of the fee. They do not show what a fair fee would be if the base were restricted as they contend it should be, nor do they show that they are prejudiced by the inclusion of the entire highway system in the base, because if its total cost is included, likewise its total income must be included, which has not been done.

With the principle established that a reasonable fee for the use of the highways should include a fair part of the original cost, depreciation, maintenance, and policing, we pass to the determination of the contention that plaintiffs individually and as a class are assessed more than a reasonable amount for those purposes.

Individually, plaintiffs insist that their uses of the highways vary greatly in amount as between themselves and also as compared to other classes of carriers such as intrastate operators, and that since their use of the highways differ in amount, different fees should be charged. Within certain limits a tax such as this must be recognized as a privilege tax. Administrative difficulties may lay in the way of collecting a tax upon an exact mileage basis and there is nothing unreasonable or oppressive in a fee for the privilege for a use as extensive as the carrier desires

to make it. It is therefore immaterial that one may pay less for the greater use of the same privilege so long as each plaintiff is not charged an unreasonable fee for the use of their privilege. Aero Mayflower Transit Co. vs. Public Service Commission, 295 U. S. 285. Morf vs. Bingaman, 298 U. S. 407.

Collectively, plaintiffs assert that the amount paid by interstate motor carriers bears no reasonable relation to [fol. 53] the total amount of the use of the highways by such carriers.

The same principles apply to plaintiffs individually and as a class. The burden is upon them in either case to demonstrate that the legislative action complained of is without rational basis. Aero Mayflower Transit Co. vs. Public Service Commission, supra. South Carolina State Highway Department vs. Barnwell Bros., Inc., U. S. Supreme Court, decided Feb. 14, 1938, 82 L. Ed. (Adv.) 469, 58 S. Ct. (Adv.) 510.

Plaintiffs have offered no evidence from which it appears that the legislature has erred in establishing its schedule of fees.

It is next contended that the fees are invalid as a matter of law because they are assessed on a flat rate annual basis, do not vary according to mileage traveled, and are not predicated upon the use made of the highways. In effect this is the same contention considered above. In addition to that which has already been said on the subject it is appropriate to note that the fees assessed are asserted by the Legislature to be for the sole purpose of maintenance, and proper care of the highways (Section 5272 (a), R. S. Mo. 1929, as amended by Laws Mo. 1931), (Art. IV, Section 44a, Missouri Constitution). Under the facts of this case such cases as Ingels vs. Morf, 300 U. S. 290, Interstate Transit, Inc., vs. Lindsey, 283 U. S. 183, and Sprout vs. South Bend, 277 U. S. 163, are inapplicable.

It is next contended that the fees charged are unreasonable because they do not increase in direct proportion to the increase in the weight carrying capacity of the vehicle. Upon that point plaintiffs' expert testimony was to the effect that no rational method has been devised by which an approximate estimate may be made of the relative destructive effect of traffic and natural forces or the relative destructive effect of heavy and light loads. He stated that

in his opinion the most rational assumption is that the destructive effect of traffic loads combined with natural forces, is in direct proportion to the magnitude of the loads. [fol. 54] However valuable such an expert opinion might be to a legislative body clothed with ample authority to determine the scientifically precise fee plaintiffs should pay, such a criterion is not one which a court may adopt in determining the constitutionality of an act of the Legislature and such evidence is insufficient to sustain a charge that a legislative act is unconstitutional because not based on any rational theory.

It is asserted that the schedule of fees is discriminatory because of the exemption of trucks of a capacity of not more than one and one-half tons carrying capacity. It was for the Legislature to determine where the line of exemption should be drawn, and no question of denial of the equal protection of the law is presented. Carley & Hamilton vs. Snook, 281 U. S. 66.

Discrimination is further charged because the license fees levied by Section 5272 apply only to common carriers and not to private or contract carriers. There is no proof of the extent of use of the highways by private or contract carriers. A sufficient distinction between uses of highways for private and contract carrier uses and uses as a common carrier exists to defeat that charge of discrimination. Liberty Highway Co. vs. Public Utilities Commission, 294 Fed. 703. Clark vs. Poor, 274 U. S. 554. Bekins Van Lines vs. Riley, 280 U. S. 80.

The contention that the assessment of a fee of one-third the usual amount for operations less than ten miles in length within the state and one-half the usual amount where the operation is twenty miles or less, is unreasonable, is without merit. Continental Baking Co. vs. Woodring, 286 U. S. 352. Especially is this true in view of the provision of Section 5268 (b) relating to the issuance of temporary permits to interstate carriers for "occasional trips" into or through the state.

The remaining contention is to the effect that the entire Missouri Act is now inoperative by reason of the passage of the Motor Carrier Act of 1935, Title 49 U. S. C. A., Section 301-327. There seems to be no necessity to inquire into [fol. 55] the extent to which Congress by its statutes (Title 49, U. S. C. A. 301-327), and the regulations of the Inter-

state Commerce Commission pursuant thereto has occupied the field of interstate transportation as pertains to service, accounting, operation and equipment. The state has an undoubted right to exact a compensatory fee for the use of its highways and interstate carriers are not exempt from that charge. The Missouri Act has a separability clause, Section 5278, and the other provisions would still remain effective as applied to intrastate carriers and it cannot be presumed that the Legislature of the state would not have enacted the statute just as it is, conceding it would not apply to interstate carriers except as to charging them fees for the use of the highways. Congress recognized that states would continue to assert their power to tax interstate carriers for their use of their highways as it provided in Section 302-(c) that nothing should be construed to affect the powers of taxation of the several states. Carley & Hamilton vs. Snook, 281 U. S. 66.

Since plaintiffs have failed to show that interstate commerce is unduly burdened and have failed to show any unconstitutional discrimination against them, it is unnecessary to consider plaintiffs' objections to the consideration of defendants' "cost study."

For the reasons stated, plaintiffs' bill should be dismissed on the merits.

Defendants should submit formal findings of fact and conclusions of law in conformity with the views expressed in this opinion. Plaintiffs are allowed an exception.

Archibald K. Gardner, Circuit Judge. J. C. Collet, District Judge. Merrill E. Otis, District Judge.

Dated this 15th day of June, 1938.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed July 2, 1938

This cause came on regularly to be heard before this specially constituted district court of three judges, Honorable Archibald K. Gardner, Circuit Judge, Honorable J. C. Collet, District Judge, and Honorable Merrill E. Otis, Dis-

trict Judge, convened in accordance with the statutes applicable thereto, on the 24th day of September, 1937, with continued hearing on the 31st day of January, 1938, at Kansas City, Missouri. Plaintiffs appeared by their counsel, Kenneth Teasdale, B. W. La Tourette, and Paul G. Koontz. Defendant Public Service Commission of Missouri appeared by its counsel, James H. Linton and Daniel C. Rogers. Defendant State Highway Commission of Missouri appeared by its counsel, Louis V. Stigall and Wilkie B. Cunnyngham. The defendants, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, Honorable Lloyd C. Stark, Governor of the State of Missouri, and Honorable Roy McKittrick, Attorney-General of the State of Missouri, appeared by their counsel, Covell R. Hewitt. Interveners Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; the Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, J. M. Kurn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company, Berryman Henwood, Trustee of St. Louis Southwestern Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, appeared by their counsel, [fol. 57] Joseph H. Hays, F. H. Moore, Carl S. Hoffman, and Amos M. Mathews. Intervener City of St. Louis, Missouri, appeared by its counsel, John G. Burkhardt. Intervener Missouri Municipal Association appeared by its counsel, George A. Spencer. Evidence having been fully submitted, oral argument of counsel had, and printed briefs having been submitted as directed, the court being now duly advised in the premises makes the following findings of fact and enters the following conclusions of law, pursuant to Equity Rule Number 70½.

Findings of Fact

1. Plaintiffs are engaged in interstate commerce as common carriers of property by motor vehicle upon the public highways of Missouri, and some of them are duly authorized so to operate under the provisions of the Motor Carrier Act, 1935, 49 U. S. C. 301-327. In the conduct of

such businesses, each of the plaintiffs operates motor trucks of more than one and one-half tons carrying capacity.

2. Plaintiffs seek to enjoin defendants from enforcing against plaintiffs Sections 5264 to 5280, as amended, both inclusive, Revised Statutes of Missouri, 1929, known as "Missouri Bus and Truck Law", and the rules of the Public Service Commission of Missouri made under the authority thereof. Plaintiffs' proof and argument were directed to the proposition that the annual license fees provided to be paid by Section 5272 cannot be lawfully enacted of the plaintiffs, being invalid by reason of the Commerce Clause and 14th Amendment of the Constitution of the United States.

3. Plaintiffs attack the Missouri statutes on the grounds that the fees in question are (a) unreasonable and discriminatory, and (b) inoperative by reason of the fact that Congress has taken over the regulation of Interstate motor carriers by enactment of the Motor Carrier Act, 1935. They specifically claim that the statute is unconstitutional for the following reasons: because the fees are excessive in amount; because they bear no reasonable relation to the extent of the use of the highways; because they are graduated not directly in proportion to weight but progressively with higher rates per ton for vehicles of greater weight carrying [fol. 58] capacity; because trucks of not more than one and one-half tons weight carrying capacity are exempted; because private carriers are exempted, including those operating not for hire and contract carriers operating for hire but not for public hire; because trucks traveling different annual mileages must pay the same annual fees; because interstate carriers whose total route mileage in Missouri is not more than ten miles pay one-third of such annual fees, and those whose total route mileage in Missouri is not more than twenty miles pay one-half of such annual fees; and because the power of the State of Missouri to require such annual fees of interstate motor carriers has been superseded by The Congress of the United States in the enactment of the Motor Carrier Act, 1935, 49 U. S. C. 301-327.

4. In addition to the fees under attack here, which apply only to trucks operated as common carriers for hire, by the provisions of Sections 7761 and 7763, Revised Statutes

of Missouri, 1929, a registration fee is levied upon all trucks and passenger vehicles whether used for private or commercial purposes and by the terms of other statutes a tax of two cents per gallon is levied upon all gasoline consumed in the operation of motor vehicles upon the public highways. Neither this registration fee nor gasoline tax is challenged in this proceeding.

5. The schedule of annual license fees provided in Section 5272 and which is assailed by plaintiffs is as follows, based upon weight carrying capacity.

More than 1½	and not more than 2 tons	$25.00
More than 2	and not more than 3 tons	65.00
More than 3	and not more than 4 tons	100.00
More than 4	and not more than 5 tons	135.00
More than 5	and not more than 6 tons	175.00
More than 6	and not more than 7 tons	225.00
More than 7	and not more than 8 tons	275.00
More than 8	and not more than 9 tons	350.00
More than 9	tons	500.00

Defendants urged, in oral arguments, briefs and evidence offered, as a proper basis to support the legislative judgment in fixing such fees in the amounts as aforesaid, that [fol. 59] (a) the proper compensable elements of annual highways costs include: The aggregate investment in improvements on highways and streets amortized annually over their service lives; interest on the unamortized portion of such investment; the annual cost of maintenance, policing and administration; a charge representing taxes foregone on the capital so invested; and a charge for the use of the land occupied; and (b) that not less than fifty per cent of such annual cost of streets, sixty-six per cent of such annual cost of local roads and ninety per cent of such annual cost of state highways may properly be charged to motor vehicles as a class; and (c) that such portion of such annual cost, properly chargeable to motor vehicles as a class, is assignable to the respective vehicles in accordance with the average weight of each vehicle and the average miles it travels, and (d) that such fees fixed in said Section 5272 are lesser in amount but fairly representative of the sums arrived at by considering the foregoing elements and factors after resignation fees and gasoline taxes are credited.

6. Plaintiffs have failed to sustain the burden of proving that the Legislature erred in establishing the schedule of fees in question or that such schedule of fees or the basis of their calculation on the above or some other proper plan within the discretion of the legislature is unreasonable, unjust or constitutes an undue burden on interstate commerce.

7. The Missouri highways are public highways and are and have been open, from the time of their establishment and construction, to all proper uses and by all classes of the traveling public and a statutory fee charged for the use of such highways, on the premise that all classes of vehicle users, including trucks, should participate in defraying their cost, is not unreasonable nor arbitrary because trucks are included as one of the classes required to contribute to original and subsequent costs.

8. In the establishment and construction of its highway systems, the State of Missouri recognized the truck traffic then in existence and that which might reasonably be contemplated; had a right to do so; and a statute enacted pursuant to that right and anticipating future uses of its [fol. 60] highway facilities and levying fees which would require such new uses to share the burden of the original cost of such facilities is not unreasonable nor arbitrary because truck traffic by common carriers, whether in existence at the time such highways were built or developed since that time, is subject to such fees.

9. The weight of a truck and the miles that it travels are pertinent factors in causing depreciation of pavement, structures and other elements of public highways and may be properly considered as an element of comparative cost in fixing fees for highway use which are higher for heavier vehicles than for lighter ones.

10. Plaintiffs have failed to prove their contention that highway maintenance cost is not increased by the traffic of heavy trucks. The weight of a truck and the miles it travels are factors in creating maintenance expense and pertinent and proper factors to be considered in fixing fees for highway use which are higher for heavier vehicles than for lighter ones.

11. The license fees under consideration here, registration fees and gasoline tax constitutes substantially the en-

tire income of the State from the use of its highway system; such income is derived from the use by vehicles of all local and state roads and city streets and it is impossible to segregate the income derived by the State from the use of the separate classes of thoroughfares; since the reasonableness of the fees may be determined by the comparison of the aggregate income which they produce with the aggregate cost of the facilities required to produce it, and since the income produced by specific segments of the highway system cannot be identified and must therefore be considered collectively, it is reasonable and proper to include the cost of the entire highway system, as distinguished from specific segments thereof, in calculating the amount and determining the reasonableness of fees for highway use; and Section 5272 is not unreasonable nor oppressive because the method of arriving at the amounts therein specified may have included the cost of and income derived from the entire system, taking into consideration average costs and average use.

[fol. 61] 12. The fees provided in Section 5272 are levied as compensation for the privilege of the use of Missouri highways which use is as extensive as the carriers who pay such fees desire to make. There is nothing in the statutes under attack which limits the number of miles a vehicle may be operated and the routes in Missouri being used by plaintiffs and other interstate carriers are those of their own selection. There is no proof of any refusal by the State of Missouri to allow plaintiffs or any of them permission to use any highway and it may not be assumed that any such use would be denied in the future.

13. Plaintiffs have failed to prove that there exists any rational method of approximately estimating the relative destructive effect on highway traffic and natural forces or the relative destructive effect of heavy and light loads and have failed to prove that the judgment of the legislature in fixing fees progressively higher for heavier loads is unjust, unreasonable or oppressive.

Conclusions of Law

1. The court has jurisdiction of the parties and of the subject matter of this action.

2. One who assails a statute which fixes a schedule of fees as compensation for highway use, on the ground that

it is unreasonable, arbitrary and discriminatory and constitutes an undue burden on interstate commerce, has the burden of proving the unreasonableness of the fees and the unreasonableness and injury of the method used in determining the amount of the fees and of proving the existence of unconstitutional discrimination as a matter of fact.

3. In the absence of proof of an exact method of calculating highway costs in their relation to vehicle use, the subject lies within the broad realm of legislative discretion and the burden rests upon one attacking a statute fixing such fees to prove that the legislative action complained of is without any rational basis.

4. Within certain limits the fees by Section 5272 are a tax for the privilege of using the highways of Missouri and, in the absence of proof that they are unreasonable in amount as compensation for such privilege, the purpose to which the legislature applies the proceeds of the tax and [fol. 62] the relationship of the tax to the cost of policing and administration are immaterial.

5. Administrative difficulties in the collection of a tax varying in amount with exact mileage traveled are sufficient to sustain the exaction of a flat annual fee in the absence of proof that such flat annual fee is unreasonable in amount.

6. There exists a sufficient distinction between the use of public highways for private and contract carrier uses and the use of such highways as a common carrier to sustain their separate classification and treatment, and Section 5272 is not discriminatory because it applies only to common carriers.

7. Common carriers of property by motor vehicle, regularly operating over certain selected highways only, can be required to pay fixed, annual license fees, and the cost of all of the highways of the state may be included in the basis for fixing such license fees.

8. The license fees required by said Section 5272 are not discriminatory or otherwise invalid because they increase in amount progressively and not proportionally to the authorized weight-carrying capacity of the vehicle.

9. The exemption of trucks of one and one-half tons and less of weight-carrying capacity is valid.

10. The provisions of the statute that an interstate motor carrier whose total route mileage in the state is not more than ten miles must pay one-third of the fees in question, and that a carrier whose total route mileage is not more than twenty miles in the state must pay one-half of the fees, are not unreasonable or discriminatory and are valid.

11. The power of the defendants and the State of Missouri to require the license fees in question has not been superseded by the Congress of the United States in enacting the Motor Carrier Act, 1935, 49 U. S. C. 301-327.

12. The relief asked by plaintiffs should be denied and plaintiffs' Bill of Complaint should be dismissed with prejudice.

[fol. 63] To all of the foregoing, plaintiffs except and are duly allowed exceptions.

Done this 2nd day of July, 1938.

Archibald K. Gardner, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER AND COUNTERCLAIM—Lodged July 26, 1938

Come now Public Service Commission, Honorable Roy McKittrick, Attorney General of the State of Missouri, Honorable Lloyd C. Stark, Governor of the State of Missouri, and the State Highway Commission, defendants in the above entitled cause, and file this amended answer and counterclaim against each and all plaintiffs for fees owing by them to the State of Missouri for the use of its public highways, and state that plaintiffs' liability to the State of Missouri for such fees has occurred since the filing of plaintiffs' Bill in equity, to-wit, since May 15, 1937.

Defendants state that plaintiffs, since the aforesaid fifteenth day of May, 1937, have failed and refused to pay fees to the State of Missouri for the use of its public highways as common carriers, as provided by law, and have failed and refused to comply with and obey the provisions of the temporary restraining order for the deposit of fees which would be owing and payable by each of them to the

State of Missouri by law except for the effectiveness of the temporary restraining order. Defendants further state and allege that plaintiffs, and each of them, have continued to operate upon and over the public highways of the State of Missouri daily large numbers of trucks carrying property as common carriers or motor carriers in interstate commerce, in disobedience of the temporary restraining order and the laws of Missouri, as aforesaid.

In particular, defendants allege that the aforesaid disobedience of the law and of the provisions of the temporary [fol. 64] restraining order, and the failure of plaintiffs to deposit fees in custody of the trustee, as contemplated under the temporary restraining order, have been committed by each and every one of the plaintiffs in all of their interstate transportation operations within the ten and twenty mile zones mentioned in Section 5272 of the Missouri Bus and Truck Law, appearing at pages 304-316, both inclusive, Laws of Missouri, 1931.

Defendants state that plaintiffs and each of them do now, and will at the determination of this cause of action, owe the State of Missouri large amounts of money in the nature of fees for the use of its public highways since the effective date of the temporary restraining order, which amounts of money, except for the effectiveness of the temporary restraining order, would have been payable by each and every plaintiff as fees, under the provisions of Section 5272 of the Missouri Bus and Truck Law aforesaid, for the use of the public highways of the State of Missouri.

Defendants state that the number of trucks and the times and places of their operation upon and over the highways of the State of Missouri, within the ten and twenty mile zones, constitute information wholly within the knowledge of the plaintiffs and state that they do not have access to plaintiffs' records nor do they possess other means for determining the amount of money owing by plaintiffs to the State of Missouri, and state that only by an accounting conducted under the supervision of this Court may defendants in behalf of the State of Missouri have an adequate remedy for recovery of the aforesaid fees.

Defendants specifically allege that the aforesaid liability of the plaintiffs to the State of Missouri for fees for the use of its highways arises out of the transaction which is the subject matter of plaintiffs' Bill in equity and further allege that except for the effectiveness of the temporary

restraining order of this Court and the continuing disobedience thereof by plaintiffs, the fees herein mentioned would have been by law owing and payable by plaintiffs, and each of them, to the State of Missouri.

Because of the premises defendants are without an adequate or efficient remedy at law and therefore [being] this counterclaim in equity.

[fol. 65] Wherefore, defendants pray the Court to take jurisdiction of this amended counterclaim as an action in equity and further pray the Court to provide the means and remedy whereby the moneys owing by plaintiffs and each of them to the State of Missouri may be equitably and accurately determined and for such other relief in the premises as the Court may deem just and proper.

Public Service Commission of the State of Missouri, by James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel; Honorable Roy McKittrick, Attorney General of the State of Missouri, by Covell R. Hewitt, Assistant Attorney General; Honorable Lloyd C. Stark, Governor of the State of Missouri, by Covell R. Hewitt, Assistant Attorney General; Highway Commission of the State of Missouri, by Louis U. Stigall, General Counsel.

SUGGESTIONS IN SUPPORT OF JURISDICTION OF AMENDED COUNTERCLAIM

In Case No. 660, In Equity, styled Frank Eichholz vs. Sam O. Hargus, et al. (not yet published in Advance Sheet), in this same division of the United States District Court, a three-judge court took jurisdiction of a counterclaim which also has for its purpose the recovery of fees for the use of the Missouri highways.

In the Eichholz case the reasons for the court taking jurisdiction of the counterclaim were less favorable than here. In that case defendant Public Service Commission had revoked the interstate permit of Eichholz. While operating thereafter under the protection of a temporary injunc- [fol. 66] tion he had failed to pay fees due the State. The court held that it had jurisdiction of the counterclaim, and appointed a special master to proceed with the taking of evidence to determine the amount of fees owing by Eichholz to the State.

The following extract from the Eichholz case is pertinent here:

"4. The defendant has filed a supplemental pleading wherein there is a prayer for an accounting of fees accumulated during the operations of the plaintiffs since the granting of the original restraining order, December 31, 1936.

While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.

Under Equity Rule 30, a defendant has a right to interpose a counter-claim 'arising out of the transaction which is the subject-matter of the suit.' It is doubtful whether these claims arose out of the transaction which is the subject-matter of the suit, and, yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.

"No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us.

In Piedmont & N. Ry. Co. vs. Query, 56 F. (2d) 172, loc. cit. 175, the court said in discussing similar questions:

'And if either of these is a substantial question under the Constitution, we must proceed with the consideration of the other questions presented; for in such case the jurisdiction of the court extends to every question involved, [fol. 67] whether of federal or state law, even though the court may not find it necessary to decide the federal question.'

In Sovereign Camp, W. O. W. vs. Murphy, 17 F. S. 650, l. c. 652, a case like this heard before three judges sitting in the Southern District of Iowa, the court said:

'But the duty imposed on the three-judge court * * * carries with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be

relegated to piecemeal trials of the several issues joined by them in their case.'

The same principle was announced in Greene vs. Louisville Railroad, 244 U. S. 499, loc. cit. 508, where the court said that:

"The jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case. Including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all.'

In view of the above, unless the parties can agree after an inspection of the records upon the amount of the accumulated fees, it will be necessary to appoint a master to take an accounting and make his report to the court."

Without comment thereon the attention of the Court is also directed to Equity Rules 19, 30 and 34. It would seem that these rules do not contemplate the filing of a counterclaim of this nature until the occurrence of it has been completed or nearly so. The occurrence of increasing indebtedness to the State of Missouri by the plaintiffs will not be completed until the State is no longer restrained in the enforcement of its law against plaintiffs. It is the position of defendants, therefore, that this amended counterclaim is timely filed. It is the conviction of defendants that the subject matter of the counterclaim arises directly out of the disobedience of the temporary restraining order by plaintiffs. Therefore, the subject matter of the counterclaim is within the jurisdiction of the Court.

A casual inspection of Section 263 of the subject, Courts, in the Federal Digest shows that many cases have been [fol. 68] decided by three-judge courts in which questions other than the one directly relating to the grant or refusal of the injunction were involved.

For example, a three-judge district court in the case of Georgia S. & F. Ry. Co. vs. Georgia P. S. C., 289 F. 878, held that,

"Where a suit involves a federal question which gives a federal court jurisdiction, such jurisdiction extends to the determination of all questions involved in the case, including questions of state law, irrespective of the disposi-

tion made of the federal question, or whether it is found necessary to decide it at all."

Again, in the case of M. W. A. vs. Casados, 15 Fed. Supp. 483, l. c. 486, a three-judge district court said:

"Jurisdiction of a three-judge court, as in other cases, must be determined by the facts well pleaded in the bill; it cannot depend upon the decision eventually reached. Jurisdiction so existing, a three-judge court, like other courts, will decide the controversy on the ground it deems to be correct, state or federal; the law does not demand that any case be tried piecemeal."

A similar holding is found in a three-judge district court decision in 51 F. (2d) 573 (El Paso & S. W. R. Co. vs. Arizona Corporation Commission), as follows:

" 'The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.' "

Jurisdiction of counterclaims by district courts has been upheld not only by the circuit courts of appeals but by the United States Supreme Court. See Frank Moore vs. New York Cotton Exchange, 70 L. Ed. 750, 270 U. S. 593.

If is the contention of defendants that although a three-judge court performs a special duty, as provided by Sec- [fol. 69] tion 380 of the Judicial Code, it is nevertheless a court of equity, subject to the customary procedure allowable in courts of equity.

Respectfully submitted, Public Service Commission of the State of Missouri, by James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel; Honorable Roy McKittrick, Attorney General of the State of Missouri, by Covell Hewitt, Assistant Attorney General; Honorable Lloyd C. Stark, Governor of the State of Missouri, by Covell Hewitt, Assistant Attorney General; Highway Commission of the State of Missouri, by Louis U. Stigall, Chief Counsel.

In United States District Court, Western District of Missouri, Central Division

No. 665

In Equity

Brashear Freight Lines, Inc., et al., Plaintiffs,

vs.

Public Service Commission of Missouri, et al., Defendants;

The Atchison, Topeka and Santa Fe Railway Company, et al., Interveners

Final Decree—Filed August 4, 1938.

This cause came on to be heard before this specially constituted district court of three judges, duly convened according to law, on the 24th day of September, 1937, with continued hearing on the 31st day of January, 1938, at [fol. 70] Kansas City, Missouri. Temporary restraining order, restraining defendants as prayed in plaintiff's bill of complaint, issued on the 15th day of May, 1937, and by stipulation of counsel for the parties, approved by the court, it was agreed that the temporary restraining order should remain in effect until final decision on the merits of the relief asked in plaintiffs' bill of complaint and that hearing on plaintiffs' application for temporary and permanent injunction should be consolidated.

Upon the issues made by plaintiffs' bill of complaint and the answers of the defendants and interveners thereto, the evidence having been fully submitted, arguments of counsel having been made and printed briefs filed, and the court having heretofore filed and entered its findings of fact and conclusions of law in favor of the defendants, and the court being now fully advised, It Is Ordered, Adjudged and Decreed, as follows:

1. That the plaintiffs are not entitled to a permanent injunction against the defendants;

2. That the relief prayed for in plaintiffs' bill of complaint should be and is hereby in all respects denied, and plaintiffs' bill of complaint is hereby dismissed on its merits;

3. That the temporary restraining order heretofore granted to plaintiffs by this court against the defendants, be and the same hereby is dissolved;

4. That the issue raised by the defendants' counterclaim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised.

5. That defendants recover their costs and disbursements herein, to be taxed as provided by law and inserted herein in the sum of ..... Dollars.

To all of the foregoing plaintiffs except, and their exception is hereby allowed.

[fol. 71] Dated this 3rd day of August, 1938.

Archibald K. Gardner, Circuit Judge; J. C. Collet, District Judge; Merrill E. Otis, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING AND MOTION TO MODIFY THE DECREE —Filed September 3, 1938

Now come defendants in the above entitled cause and file this pleading requesting the Court

First, to grant a rehearing in said cause in order that defendants may be given an opportunity to try the issues made upon the counterclaim and the answer of plaintiffs thereto;

Second, to grant a rehearing for the purpose of allowing defendants to present two contempt motions which have long since been pending before the Court and which have not been given any consideration by it;

Third, to modify paragraph numbered 4 on the second page of the decree of the Court.

Wherefore, defendants pray the Court to grant a rehearing in said cause for the purpose of (1) trying the issues made upon the counterclaim and the answer thereto, (2) presentation of contempt motions, and (3) modifying para-

graph 4 of the decree, eliminating therefrom the statement that defendants failed to urge and present the counterclaim.

James H. Linton, General Counsel, Daniel C. Rogers, Assistant Counsel, Solicitors for Defendants.

[fol. 72] SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION

In support of defendants' motion for rehearing and motion to modify the decree, the following is respectfully submitted:

First: Defendants state that the original counterclaim in said cause was filed on September 17, 1937, as a part of defendants' joint answer, and further state that plaintiffs' general denial thereto was filed on September 23, 1937.

In paragraph numbered 4 of the decree of the Court, the Court has dismissed the counterclaim with the following statement:

4. "That the issue raised by the defendants' counterclaim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."

Defendants state that the Court is in error in stating that the counterclaim was not urged nor presented by the parties. When the case was tried on its merits on January 31, 1938, counsel for defendant Public Service Commission, during the preliminaries preceding the presentation of the evidence, brought the matter of the counterclaim and the contempt motions to the attention of the Court, as follows:

Transcript of Proceedings,

January 31, 1938,

Volume II, pp. 131-136

"Mr. Rogers: * * * * * * * *

Now, if the Court please, I wish to draw attention to a matter which was not brought to the attention of the

Court when we were here last time, and that is the defendants have filed here since the Bill was introduced, of course, two contempt motions. One of these contempt motions [fol. 73] alleged that approximately thirty of these plaintiffs have never complied with the temporary restraining order of this Court by failing to file the reports that were contemplated by the temporary restraining order. The other contempt motion is against the considerable number of the plaintiffs, I cannot state at this time the number, for another violation of the temporary restraining order, in that after they were obliged, under the terms of the temporary restraining order, to carry travel orders on their trucks they did not have travel orders on their trucks as they were inspected from time to time by the police officers of the State of Missouri.

Now, the second part of our defense is a counterclaim. The counterclaim of the Public Service Commission is to this effect, that inasmuch as there are approximately thirty of these plaintiffs who have never complied with the Missouri Bus and Truck Act and who, however, have come in as plaintiffs and admit that they are using our highways, have never even to this day, and contrary of course to the temporary restraining order, have used our highways and, therefore, if the issues should be against the plaintiffs, these approximately thirty would owe the State of Missouri sums of money, and the knowledge concerning the sums of money is wholly within their possession because we have no records whatever of them in the Public Service Commission in Jefferson City. So, in effect, the counterclaim of the defendants outlines these facts and states to the court, as it were, that owing to the nature of the determination of the amounts of these plaintiffs would owe the State, we think the appointment of a Master would really be necessary in order to find out what they owe the State. Now, this is somewhat maybe in the nature of a suggestion; I make it, and the Court will take it for what you think it is worth. It seems to me of course that if the plaintiffs should prevail in this suit and our bus and truck fees should be declared invalid, then morally speaking, I assume is the correct word to use, that we would have no accounting against these plaintiffs on this counterclaim at some future time. Although the plaintiffs have already technically violated the provisions of the temporary restraining order, in

the spirit of leniency I would be willing to suggest to the Court that should the truck and bus fees under the Missouri [fol. 74] law be declared invalid that while we would still have that technical complaint against them that they violated your temporary restraining order, yet if you should declare these fees invalid, our two contempt motions probably would be more or less insipid as having no real substance in them against these plaintiffs, which leaves me, after that explanation, to ask the Court to consider whether or not you would prefer that we go ahead with the principal issues here with reference to the cost study and this conflict of Federal and State laws and leave the two contempt motions and the counterclaim for a later setting.

Judge Otis: A later setting would not be necessary if the plaintiffs prevail in the principal suit, according to your theory.

Mr. Rogers: That is probably true, Your Honor, but we would leave that to the Court to determine. I am of that opinion, though. If I may say just a word further so the court may know, we are here prepared to try this case on the part of the defendants in such manner as the Court feels that we are entitled to.

* * * * * * *

Mr. Teasdale: May it please the Court. Referring to the last subject first, I think myself that the issues that might be brought out by the counterclaim, if it ever becomes pertinent, should be deferred to another time and we should not attempt to consider them now. The same may be said as to the motions for contempt. It would take rather an involved hearing to decide upon those and their relevancy may change later.

* * * * * * *

Judge Gardner: We may clear a part of it now. The cross complaint and contempt motions in this case, if the Court should sustain the position of the defendants, we will retain jurisdiction of these matters, but will not hear them now."

In support of the proposition that the counterclaim arises out of the transaction which is the subject matter of the [fol. 75] suit or that it is the subject matter of an independent suit in equity, reference is made to the case of

Frank Moore vs. New York Cotton Exchange, 70 L. Ed. 750, 270 U. S. 593. Therein the appellant, who appealed from the order of the district court dismissing his bill, alleged that the exchange had refused to furnish him with a certain telegraphic service on cotton quotations and asked for a mandatory injunction compelling the exchange to furnish such service to him. Appellees filed a counterclaim alleging that appellant was already purloining its cotton quotation service from another source and asked for an order enjoining appellant from further purloining such service. The district court dismissed appellant's bill on the merits and issued a permanent injunction against appellant compelling it to cease in its practices of purloining appellees' cotton quotations. The Court said that "transaction" is a word of flexible meaning. It held that the counterclaim was an action in equity arising out of the transaction which is the subject matter of the suit. It is a case directly in point here.

Second. The Court will recall that two contempt motions were pending at the time the case was tried on the merits on January 31, 1938. That these two motions were called to the attention of the Court at that time has heretofore been mentioned in the quotations from the transcript of the evidence. These motions are important, and should be disposed of in an orderly way by the Court. If permitted to expire by default, injury will have been done to the cause of motor carrier regulation. Trifling with the reasonable orders of the Court should not be condoned, and the defendants are acting with due deliberation in now urging that the Court give due attention to the contempt motions.

Third. Regardless of what conclusion the Court may reach with reference to taking jurisdiction of the counterclaim, and hearing the contempt motions, it is respectfully urged to correct paragraph numbered 4 of its decree by striking therefrom the erroneous statement that defendants neither urged nor presented their counterclaim. Convicted by the Court of neglect in presenting the counterclaim, defendants would be unfairly prejudiced thereby upon [fol. 76] appeal. The least that the Court should do on this motion is to modify its paragraph 4 of the decree.

Respectfully submitted,

James F. Linton, General Counsel; Daniel C. Roger, Assistant Counsel, Solicitors for Defendants.

In United States District Court

[Title omitted]

Order Modifying Decree and Overruling Petition for Rehearing—Filed September 16, 1938

The petition for rehearing and motion to modify the decree herein having been duly presented and considered by the court,

It Is Now Ordered that Section 4 of the decree as entered herein by and the same hereby is modified to read as follows:

4. That as to the issue raised by defendants' counterclaim, the court being in serious doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised.

It Is Further Ordered that the petition for rehearing be and the same hereby is denied and overruled.

[fol. 77] Defendants are allowed an exception to the above rulings.

Dated this 15th day of September, A. D. 1938.

Archibald K. Gardner, Circuit Judge; Merrill E. Otis, District Judge; J. C. Collet, District Judge.

In United States District Court

[Title omitted]

Statement of the Evidence—Filed November 28, 1938

As this is an appeal from the Decree of the District Court dismissing Defendants' Counterclaim and refusing to allow them to file an Amended Counterclaim, most of the evidence upon which the appeal is based is found on the face of the pleadings of the case, as follows:

Seventy-six (76) plaintiffs joined in the Bill in Equity filed on May 15, 1937. All of them were engaged in trans-

porting property by motor vehicles in interstate commerce over the public highways of the State of Missouri.

In their Bill in Equity plaintiffs challenged the validity of the fees provided by the aforesaid Missouri Bus and Truck Law for the use, maintenance and repair of the state highways, on the ground that such fees were excessive and bore no reasonable relation to plaintiffs' use of the highways. They sought therein to restrain the Public Service Commission and other defendants from enforcing said Act against themselves, and from collecting from themselves the fees provided in the State Act.

Stipulation of the parties was, on May 27, 1937, adopted by the Court as a modification of its temporary restraining [fol. 78] order issued on May 15, 1937. All of the plaintiffs were thereby required to deposit the state fees falling due for use of the public highways of the State of Missouri with a named trustee until final determination of the injunction on the merits. On or before May 27, 1937, plaintiffs filed two indemnifying bonds, one for $10,000 and one for $20,000, to protect defendants and the State of Missouri against damages resulting from the injunction, if it should be dissolved.

On July 1, 1937, defendant Public Service Commission filed its motion to cite plaintiffs for non-compliance with the provisions of the modified temporary restraining order, wherein the charge was made that none of the thirty (30) plaintiffs mentioned therein had complied with the temporary restraining order, as modified.

The Counterclaim filed on September 17, 1937, being a part of Defendants' Joint Answer, reveals that thirty (30) of the seventy-six (76) plaintiffs, at no time since the enactment of the Missouri Bus and Truck Law, appearing at pages 304-316, both inclusive, of Laws of Missouri 1931, applied for interstate authority from the Missouri Public Service Commission to use the public highways of Missouri in interstate commerce or paid any fees to the State of Missouri for such use either before or after filing of the Bill in Equity.

It was further pleaded in the Counterclaim that most of the thirty (30) plaintiffs named therein were non-residents of the State of Missouri; that the Commission was without knowledge of the numbers or carrying capacities of the vehicles operated by plaintiffs; that such facts were within

the knowledge of plaintiffs; that the Commission was without adequate or efficient remedy at law and therefore had brought its action in the Counterclaim in equity. The prayer of the Counterclaim was for the District Court to take jurisdiction of the Counterclaim in equity and after a hearing thereon enter a decree for the amount of license fees owing by plaintiffs to the State of Missouri, and for any other equitable relief which may seem just and proper.

On September 22, 1937, plaintiffs filed a General Denial to the Counterclaim.

[fol. 79] At the trial on the merits of plaintiffs' Bill, in which a permanent injunction was prayed, on January 31, 1938, counsel for Public Service Commission and the Court engaged in a colloquy wherein the Court announced that upon consideration of the nature of the Counterclaim and the Contempt Motion, it would defer any hearing upon the Counterclaim or Contempt Motion until its decision on the merits should be rendered. Such colloquy is as follows:

Transcript of Proceedings, January 31, 1938, Volume II, pp. 131-136

* * * * * * *

"Mr. Rogers:

Now, if the Court please, I wish to draw attention to a matter which was not brought to the attention of the Court when we were here last time, and that is, the defendants have filed here, since the Bill was introduced, of course, two contempt motions. One of these contempt motions alleged that approximately thirty of these plaintiffs have never complied with the temporary restraining order of this Court by failing to file the reports that were contemplated by the temporary restraining order. The other contempt motion is against the considerable number of the plaintiffs, I cannot state at this time the number, for another violation of the temporary restraining order, in that after they were obliged, under the terms of the temporary restraining order, to carry travel orders on their trucks they did not have travel orders on their trucks as they were inspected from time to time by the police officers of the State of Missouri.

Now, the second part of our defense is a counterclaim. The counterclaim of the Public Service Commission is to this effect, that inasmuch as there are approximately thirty

of these plaintiffs who have never complied with the Missouri Bus and Truck Act and who, however, have come in as plaintiffs and admit that they are using our highways, have never even to this day, and contrary of course to the temporary restraining order, have used our highways and, therefore, if the issues should be against the plaintiffs, these approximately thirty would owe the State of Missouri sums of money, and the knowledge concerning the sums of money [fol. 80] is wholly within their possession because we have no records whatever of them in the Public Service Commission in Jefferson City. So, in effect, the counterclaim of the defendants outlines these facts and states to the Court, as it were, that owing to the nature of the determination of the amounts *of* these plaintiffs would owe the State, we think the appointment of a Master would really be necessary in order to find out what they owe the State. Now, this is somewhat maybe in the nature of a suggestion; I make it, and the Court will take it for what you think it is worth. It seems to me of course that if the plaintiffs should prevail in this suit and our bus and truck fees should be declared invalid, then morally speaking, I assume is the correct word to use, that we would have no accounting against these plaintiffs on this counterclaim at some future time. Although the plaintiffs have already technically violated the provisions of the temporary restraining order, in the spirit of leniency I would be willing to suggest to the Court that should the truck and bus fees under the Missouri law be declared invalid that while we would still have that technical complaint against them that they violated your temporary restraining order, yet if you should declare these fees invalid, our two contempt motions probably would be more or less insipid as having no real substance in them against these plaintiffs, which leaves me, after that explanation, to ask the Court to consider whether or not you would prefer that we go ahead with the principal issues here with reference to the cost study and this conflict of Federal and State laws and leave the two contempt motions and the counterclaim for a later setting.

Judge Otis: A later setting would not be necessary if the plaintiffs prevail in the principal suit, according to your theory.

Mr. Rogers: That is probably true, Your Honor, but we would leave that to the Court to determine. I am of that

opinion, though. If I may say just a word further so the Court may know, we are here prepared to try this case on the part of the defendants in such manner as the Court feels that we are entitled to.

* * * * * * *

[fol. 81] Mr. Teasdale: May it please the Court. Referring to the last subject first, I think myself that the issues that might be brought out by the counterclaim, if it ever becomes pertinent, should be deferred to another time and we should not attempt to consider them now. The same may be said as to the motions for contempt. It would take rather an involved hearing to decide upon those and their relevancy may change later.

* * * * * * *

Judge Gardner: We may clear up part of it now. The cross complaint and contempt motions in this case, if the Court should sustain the position of the defendants, we will retain jurisdiction of those matters, but will not hear them now."

On July 26, 1938, defendants lodged with the clerk of the Court their Amended Answer and Counterclaim. It was signed not only by the Public Service Commission, but by the Attorney General of the State of Missouri, acting as one of the defendants. The Amended Answer and Counterclaim was also signed by the General Counsel of the Highway Commission of the State of Missouri, also a defendant named in plaintiffs' Bill.

It was averred in the Amended Counterclaim that since the filing of plaintiffs' Bill in Equity on May 15, 1937, each and every one of the seventy-six (76) plaintiffs had failed and refused, thirty (30) completely and forty-six (46) partly, to comply with the provisions of the temporary restraining order requiring deposit of license fees, although all of plaintiffs had continuously used the public highways of the State of Missouri as motor carriers engaged in interstate commerce since the filing of said Bill. It was averred that plaintiffs did then and would at the termination of the case owe to the State of Missouri large amounts of money in the nature of license fees for the use of its public highways, which amounts, except for the effectiveness of the

temporary restraining order, would have been payable by each and every one of the seventy-six (76) plaintiffs as fees under the provisions of Section 5272 of the Missouri Bus and Truck Law. It was averred that the number of [fol. 82] trucks and the times and places of their operation upon the highways of Missouri constituted information wholly within the knowledge of plaintiffs, and that only by an accounting conducted under the supervision of the District Court could defendants in behalf of the State of Missouri have an adequate remedy for recovery of the fees owing to the State by plaintiffs. It was specifically averred that the liability of plaintiffs to the State of Missouri for fees arose out of the transaction which is the subject matter of plaintiffs' Bill in Equity and that except for the effectiveness of the temporary restraining order and the continued disobedience thereof of plaintiffs, the license fees provided by the Missouri Act would have been due and payable to the State of Missouri. The prayer of the Amended Counterclaim asked the Court to take jurisdiction thereof as an action in equity, and to provide the means and remedy whereby the moneys owing by plaintiffs, and each of them, to the State of Missouri may be equitably and accurately determined and for such other relief as the Court may deem just and proper.

The original Counterclaim sought to collect fees due and payable by only thirty (30) plaintiffs whom defendants then knew to be in complete non-compliance with all provisions of the aforesaid Missouri Bus and Truck Law, including payment of the statutory fees. The Amended Counterclaim sought to broaden the claim of the State of Missouri for fees by including therein the failure of all seventy-six (76) plaintiffs, thirty (30) completely and forty-six (46) partly, to pay certain fees to the State of Missouri which became due and payable after the filing of plaintiffs' Bill in Equity.

In its original Decree, filed on August 4, 1938, the Court, in paragraph 4 thereof, dismissed the Counterclaim. No opportunity or hearing of any kind was afforded defendants to present the Counterclaim to the Court on the merits thereof.

Petition for rehearing and motion to modify the decree, with suggestions, was filed on September 3, 1938, wherein defendant Public Service Commission prayed the Court for either

[fol. 83] (1) a rehearing for the purpose of allowing defendants to try the issues made upon the counterclaim and the General Denial of plaintiffs thereto,

or

(2) .....

(3) to modify paragraph 4 of the Decree of the Court.

On September 15, 1938, the Court modified paragraph 4 of its Decree and again dismissed the Counterclaim. The modified paragraph reads as follows:

4. That as to the issue raised by defendants' counterclaim, the court being in serious doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised.

It is from such dismissal that this appeal is prosecuted.

Respectfully submitted, James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel. Missouri Public Service Commission. Counsel for Appellants.

Approved Jan. 7-1939. J. C. Collet.

Service of the above Statement of Evidence is hereby acknowledged this 26th day of November, 1938.

Kenneth Teasdale, Counsel for Appellees.

[fol. 84] In United States District Court

Motion of Defendants for Costs—Filed December 15, 1938

Now come defendants Public Service Commission and State Highway Commission and move the Court to allow them, respectively, costs in the above entitled cause, as follows:

I Costs Incurred by Defendant Public Service Commission

Travel Expenses of Daniel C. Rogers:

May 27, 1937 Jefferson City to St. Louis to Hannibal ..... $ 21.70

(Conference in St. Louis with counsel for plaintiffs on Stipulation, and trip to Hannibal where Judge Collet modified temporary restraining order by including therein the Stipulation.)	
Sept. 23, 1937 Jefferson City to Kansas City (Trial on merits, presentation of plaintiffs' case only.)	23.80
Dec. 13, 1937 Jefferson City to Chicago, Illinois (Interview with Messrs. Dean Marston, Glover, Older and Attorney General of Illinois, concerning defendants' cost study brief for Missouri highways.)	34.25
Jan. 31, 1938 Jefferson City to Kansas City (Trial on merits, presentation of defendants' case.)	26.30
Printing Defendants' Brief (50 copies)	96.22
Transcript of Evidence (Anna Feltenstein)	146.95
Attorneys' Fees	1000.00
Total	$1349.22

II Costs Incurred by State Highway Commission

Witness Costs:

Dean Anson Marston (costs in bringing to trial)	$ 25.86
Tom Kennedy " " " " "	22.40
Earl J. Ward " " " " "	22.40
Arvid V. Owaley " " " " "	17.70
Harry M. Werbitsky " " " " "	23.80
Jack Howard " " " " "	1.50
Arthur J. Snedeker " " " " "	1.50
Joe B. Dudley " " " " "	17.00
Helen F. Craig " " " " "	17.00
Horace W. Craig " " " " "	17.00
Rex M. Whitton " " " " "	23.80
Percy H. Daniells " " " " "	23.80
Printing Defendants' Evidence	494.98
Transcript of Evidence (Anna Feltenstein)	68.55
Attorneys' Fees	1000.00
Total	$1777.29

[fol. 85] Summary of Costs

I Costs Incurred by Public Service Commission	$1349.22
II Costs Incurred by State Highway Commission	1777.29
Grand Total	$3126.51

Wherefore, defendants Public Service Commission and State Highway Commission pray the Court to allow their costs, respectively, in said cause, in the above amounts.

Public Service Commission of the State of Missouri, By James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Solicitors. State Highway Commission of Missouri, By Wilkie B. Cunningham.

In United States District Court

Statement of Appellees to Supplement Appellant's Statement of Evidence—Filed December 17, 1938

Appellees, and Appellant, Public Service Commission, realized prior to the decision of the Court on Appellees Bill in Equity, that the Counterclaim of Appellant, Public Service Commission, might never come before the Court for consideration. It was felt that, therefore, it would be unnecessary to consider it prior to the hearing of and rendition of opinion concerning the case presented in the Appellees Bill. Accordingly, it was agreed that Appellees might file a General Denial, to avoid being in default, with the understanding that if and when a situation arose making consideration of the Counterclaim necessary, Appellees should then have an opportunity to plead fully thereto. It was understood that Appellees thus did not waive their right to attack the Counterclaim for misjoinder, non-joinder, multifariousness, timeliness, lack of jurisdiction in the Statutory Three Judge Court, or otherwise.

[fol. 86] It was the intention and understanding of Appellees (in which they believe that the Appellant, Public Service Commission, concurred), that the Public Service Commission and other agencies of the State would take care of the enforcement of the provisions of the Act and of the Stipulation filed May 27, 1937, and would tend to

policing the Appellees' operations thereunder, inasmuch as Appellees had no facilities for doing so.

It was the intention and understanding of Appellees (in which they believed that the Appellant, Public Service Commission, concurred), that the Parties were not to interpret the Stipulation filed May 27, 1937, to include or deal with ten and twenty-mile zone operations; that the provisions of the Missouri Bus & Truck Act with reference to operations within the ten and twenty-mile zones, and with reference to the fees applicable to such operations, had not been enforced theretofore. It was the understanding of Appellees that Appellant did not seek or intend to enforce these provisions of the Act beyond the extent to which it had enforced them theretofore. It was the belief of Appellees that Appellant, Public Service Commission, concurred in this understanding.

Respectfully submitted, Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz.

Approved: Jan. 7, 1939. J. C. Collett, District Judge.

Service of the above Statement is hereby acknowledged this 17 day of December, 1938.

James H. Linton, Daniel C. Rogers, Counsel for Appellant.

[fol. 87] IN UNITED STATES DISTRICT COURT

MANDATE OF SUPREME COURT OF UNITED STATES—Filed April 24, 1939

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the Western District of Missouri, Greetings:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in a cause between Brashear Freight Lines, Inc., et al., Plaintiffs, and Public Service Commission of the State of Missouri, et al., Defendants, Equity No. 665, wherein the final decree of the said District Court (modified by order

of September 15, 1938) was duly entered in said cause on the 4th day of August, A. D. 1938; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal sued out by Public Service Commission of the State of Missouri, et al., agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered by this Court that the appeal herein be, and the same is hereby, dismissed for the want of jurisdiction.

February 13, 1939

You, therefore, are hereby commanded that such proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the twentieth day of April, in the [fol. 88] year of our Lord one thousand nine hundred and thirty-nine.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO COMMON CARRIER FEES RECEIVED BY ROY B. CHIPPS, TRUSTEE, FROM CERTAIN PLAINTIFFS, ETC.—Filed May 17, 1939

It is hereby stipulated and agreed between the parties that Roy B. Chipps, Trustee, whose duties as trustee are outlined in the temporary restraining order, as amended, has received from certain plaintiffs, and has held in trust, common carrier fees owing to the State of Missouri, under the provisions of Section 5272 of the Missouri Bus and

Truck Act and the rules of the Public Service Commission promulgated thereunder, in the total amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), itemized as follows:

		Emergency Fees	License Fees	Total
T-785	Adams Transfer & Storage Company	$ 2,532.00		$ 2,532.00
T-3712	Ben H. Barbour, d/b/a Barbour Transportation Company	6,366.96	65.00	6,431.96
T-4218	Be-Mac Transport Company, Inc.	6,913.50	1,470.00	8,383.50
T-84	Brashear Freight Lines, Inc.	1,253.00	2,100.00	3,353.00
T-4338	Commercial Freight Lines, Inc.	2,874.00		2,874.00
T-3406	Decatur Cartage Company		75.00	75.00
T-3743	Lawrence A. Elliott	1,139.00		1,139.00
T-4180	Galveston Truck Lines	900.00		900.00
T-2083	Gordons Transports, Inc.	4,885.00	2,450.00	7,335.00
T-2674	Highway Express, Inc.	2,585.00	275.00	2,860.00
T-3261	Highway Merchandise Carriers, Inc.	3,417.00		3,417.00
T-1751	Highway Motor Freight Lines, Inc.	3,283.56		3,283.56
T-2434	George Kimbel Truck Lines, Inc.	3,469.00	2,768.75	6,237.75
T-2643	M. K. & C. Truck Lines, Inc.	3,903.00		3,903.00
T-227	M-K Express Company	54.00		54.00
T-2842	Mound City Forwarding Company	97.50		97.50
T-1256	Plaza Express Company, Inc.	933.50	1,100.00	2,033.50
T-705	Potashnick Truck Service		825.00	825.00
[fol. 89]				
T-734	Powell Brothers Truck Lines, Inc.	10,802.00		10,802.00
T-3896	Riss & Company, Inc.	8,475.40	500.00	8,975.40
T-3804	Warren G. Shayler	498.48		498.48
T-2645	Southport Truck Lines	3,334.58		3,334.58
T-1539	Superior Forwarding Company, Inc.	358.75		358.75
T-3616	Transamerican Freight Lines, Inc.	2,504.90	1,000.00	3,504.90
T-1772	Viking Freight Company	326.00	5,706.25	6,032.25
T-2831	L. M. Voss, d/b/a Oklahoma Trucking Exchange	5,217.30	2,275.00	7,492.30
T-3642	Everett Wheelock and Fred G. Wheelock d/b/a Wheelock Brothers	5,682.90	1,600.00	7,282.00
	Total	$81,805.43	$22,210.00	$104,015.43

It is further stipulated and agreed that upon this 18th day of May, 1939, said amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43) has been received by the Public Service Commission from said Roy B. Chipps and that his duties as trustee have been

faithfully performed and are now completed, and, upon the filing of this stipulation, his appointment is by the parties deemed terminated.

It is further stipulated that the Massachusetts Bonding and Insurance Company is hereby discharged of any obligation whatsoever incurred by it under the provisions of its bond securing and guaranteeing the payment of all moneys collected by Roy B. Chipps as trustee of certain funds paid to him in the above entitled cause.

It is further stipulated and agreed that Public Service Commission will promptly transmit to the Treasurer of the State of Missouri, the aforesaid amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), properly itemized and credited to the plaintiffs hereinbefore mentioned.

Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Solicitors for Plaintiffs, James H. Linton, [fol. 90] General Counsel, Daniel C. Rogers, Assistant Counsel, Public Service Comm. of Missouri, Solicitors for Defendants. (Seal.)

Approved,

Massachusetts Bonding & Ins. Co., by J. G. Hedgcock, Attorney in Fact.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS, PUBLIC SERVICE COMMISSION, ET AL., FOR DAMAGES—Filed May 22, 1939

Come now defendants, Public Service Commission of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Hon. Roy McKittrick, Attorney-General of the State of Missouri, each in its or his own behalf, and each in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, and file this motion, and herein move the Court to determine and assess damages and costs against each and every plaintiff in said cause, and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed.

Defendants state certain facts, for the basis of said motion, as follows:

(1) Plaintiffs by their bill in equity, filed on May 15, 1937, sought and obtained from this Court a temporary restraining order, which remained in full force and effect until August 4, 1938. Said order restrained the Public Service Commission and other defendants from requiring plaintiffs to pay to the Public Service Commission or any of defendants certain truck license fees for the use, repair and maintenance of the public highways of the State of Missouri, as provided by Section 5272 of the Missouri Bus and Truck Law, Laws of Missouri, 1931, pages 304-316, inclusive.

(2) According to said temporary restraining order, as modified by stipulation of parties dated May 27, 1937, all of [fol. 91] plaintiffs were required to pay over to one Roy B. Chipps, as trustee, the statutory license fees mentioned above, which fees plaintiffs, under the above mentioned statute, would have been obliged to pay to the Public Service Commission for delivery to the State Treasurer of the State of Missouri except for the effectiveness of the aforesaid temporary restraining order.

(3) Thirty (30) of the plaintiffs failed and refused throughout the entire period of time the temporary restraining order was in effect, namely, May 15, 1937 to August 4, 1938, to deposit any money for license fees with said trustee, and failed and refused for such period of time to procure licenses for the use of the public highways of Missouri and to pay the license fees required by the statute aforesaid.

(4) Forty-six (46) of the plaintiffs failed and refused throughout the entire period of time aforesaid to deposit with the trustee or pay to the Public Service Commission a certain portion of the license fees required by the statute aforesaid.

(5) Among the seventy-six (76) plaintiffs, against whom this motion is directed, are individuals, partnerships, companies and corporations, whose residences and principal places of business are in many different states. On account of their disregard and violation of the aforesaid Missouri Bus and Truck Law and of the temporary restraining order, the amounts of money which the plaintiffs respectively owe in license fees for the use, maintenance and repair of the

public highways of Missouri can be ascertained only by taking an accounting of their respective books and records. It would be extremely burdensome and injurious to their interests if defendants herein, who urge this motion in their own behalf and in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, should be relegated to seventy-six (76) separate actions at law in many different states.

(6)-(a) Plaintiffs, as principals, and the Massachusetts Bonding and Insurance Company, as surety, under date of May 15, 1937 filed in this Court, according to law and the requirements of the Court, a certain injunction bond in the [fol. 92] amount of Ten Thousand ($10,000.00) Dollars, in which bond the principals and surety

"* * * are held and firmly bound unto Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, * * *"

The condition of the aforesaid bond is

"Now, if the said Plaintiffs shall abide by the decision of said Court, and pay all moneys and costs which shall be adjudged against them, in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force."

(b) Plaintiffs, as principals, and the Massachusetts Bonding and Insurance Company, as surety, under date of September 8, 1937, filed in this Court, according to law and the requirements of the Court, another certain injunction bond in the amount of Twenty Thousand ($20,000.00) Dollars, in which bond the principals and surety

"* * * are held and firmly bound unto Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, and State of Missouri, and State Treasurer of the State of Missouri, * * *"

The condition of the aforesaid bond is

"Now, if the said plaintiffs and the said interveners shall abide by the decision of said Court and pay all moneys and

costs which shall be adjudged against them in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force."

(7) The temporary restraining order, after final hearing on the merits, was dissolved by the decree of the Court entered and filed in this cause on August 4, 1938.

(8) By paragraph IV of said decree, as amended, defendants' counterclaim was also dismissed by the Court, without prejudice.

[fol. 93] (9) Plaintiffs did not prosecute an appeal from the portion of the decree of the Court dismissing their bill in equity and dissolving the temporary restraining order. Defendants prosecuted a direct appeal to the Supreme Court of the United States from paragraph IV of the decree of this Court dismissing the counterclaim, without prejudice.

(10) The mandate of the Supreme Court of the United States was filed in this Court on April 24, 1939, wherein said Supreme Court ordered that the defendants' aforesaid appeal

"* * * be, and the same is hereby, dismissed for the want of jurisdiction.

You, therefore, are hereby commanded that such proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Wherefore, defendants, each in its or his own behalf, and each in behalf of the State of Missouri, and of the State Treasurer of the State of Missouri, pray the Court to set this motion for hearing and to take such further steps as may be required to ascertain and determine the amount of license fees for the use of the public highways of the State of Missouri which have accrued against plaintiffs and remain unpaid, and to assess said sum, and costs, as damages in favor of defendants, or the State of Missouri, or the State Treasurer of the State of Missouri, and against plaintiffs, and for judgment against plaintiffs for said amount, and for judgment against their surety, the Massachusetts Bonding and Insurance Company, up to the total amount of its liability under the two injunction bonds here-

inbefore mentioned, and for such other and further relief as may be reasonable and just.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Jefferson City, Mo., Solicitors for Defendants.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR DAMAGES—Filed July 5, 1939

It appearing to the Court that the subject matter and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion above referred to is hereby overruled.

Archibald K. Gardner, Circuit Judge; J. C. Collet, District Judge; Merrill E. Otis, District Judge.

Dated this 5th day of July, 1939.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE ORDER OVERRULING AND TO RECONSIDER DEFENDANTS' MOTION FOR DAMAGES—Filed July 15, 1939

Come now defendants, Public Service Commission of the State of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, each in its or his own behalf, and each in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, and file this motion, and herein move the Court to set aside its order, entered on the 5th day of July, 1939, overruling defendants' motion [fol. 95] for damages filed on May 22, 1939, and further move the Court to reconsider defendants' aforesaid motion for damages, and to set said motion for oral argument, for the following reasons:

(1) The Court erred in its decision that all of the subject matter and the relief prayed for in defendants' aforesaid motion for damages has been heretofore ruled and finally determined in this cause.

(2) The Court erred in its decision that numerous items of damages, other than the loss of statutory truck fees, have heretofore been ruled and finally determined by the Court.

(3) The Court erred in deciding that any items of damages other than those consisting of statutory truck fees have heretofore been submitted to the Court and ruled and determined by it.

(4) The Court committed error by deciding again that defendants' motion for damages, insofar as it pertained to loss by the State of Missouri of statutory truck fees during the period of time the temporary injunction was in effect, has heretofore been submitted, ruled and determined, because in reaching such decision the Court overlooked and failed to consider proper statutes, rules of the Public Service Commission, the various pleadings and papers filed of record in this cause, the invariable practice of the Commission, and the recognition of such practice by the attorney general and the state treasurer, tending to prove that the Public Service Commission is the proper party plaintiff to maintain an action to collect the statutory truck fees mentioned in Section 5272 of the Missouri Bus and Truck Law of 1931.

Wherefore, defendants pray the Court to set aside order overruling their motion for damages and to reconsider defendants' motion for damages, and thereupon to assess damage against plaintiffs (1) for money necessarily expended in preparing and prosecuting their respective defenses, and (2) for loss of large sums of money representing statutory fees which defendants were by the Court restrained from collecting on behalf of the State of Mis-
[fol. 96] souri during the 16-months period of time the temporary restraining order was in effect.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel Public Service Commission of the State of Missouri, Jefferson City, Missouri, Solicitors for Defendants.

SUGGESTIONS IN SUPPORT OF MOTION TO SET ASIDE ORDER OVERRULING AND TO RECONSIDER DEFENDANTS' MOTION FOR DAMAGES

In support of paragraphs (1), (2) and (3) of defendants' motion, the attention of the Court is called to the fact that paragraph IV of its judgment and decree, as amended, entered on or about the 15th day of September, 1938, considered only the question of whether or not the Public Service Commission or other defendants were proper parties to maintain by means of their counterclaim an action to collect from plaintiffs the statutory fees mentioned in Section 5272 of the Missouri Bus and Truck Act of 1931. Defendants' motion for damages, filed on May 22, 1939, is not limited to damages for loss of statutory fees. It is broad enough to include, and it was intended to include, such damages to which any of defendants are entitled by reason of the necessity of preparing and carrying out their respective defenses in this cause of action. Defendants were put to considerable expense in preparation and printing of a cost study and other data which were used in defending this suit. Moreover, in the preparation and presentation of said defense, the defendants necessarily expended very substantial amounts of money for travel by their respective attorneys and others who participated in the preparation and presentation of their respective defenses.

The foregoing and other proper items of damages were included, and were intended to be included, in defendants' motion for damages filed on May 22, 1939. Therefore, the Court has committed error in dismissing defendants' aforesaid motion without affording defendants an opportunity [fol. 97] to present for the consideration of the Court various items of damages, as heretofore suggested, which have no connection whatsoever with the subject matter of defendants' counterclaim which the Court heretofore in paragraph IV of its decree, as amended, ruled and determined.

In support of paragraph (4) of defendants' motion, it is urged that the Court has committed error by deciding that the loss by the State of Missouri of statutory truck fees during the time the injunction was in effect is not a proper subject of a motion for damages which the Public Service Commission, or any of the defendants, has power or authority by law to present for the consideration of and determination by this Court.

In the first place, plaintiffs by their bill in equity expressly recognized the power of the Public Service Commission to collect from them the aforesaid statutory truck fees. They declared such fees excessive and therefore unconstitutional. They asked the Court to restrain the Public Service Commission and other defendants from collecting those statutory fees from them.

Moreover, upon the filing of the counterclaim, by means of which the Court was asked to ascertain and determine the statutory truck fees due from plaintiffs and enter judgment against plaintiffs in favor of defendants for said statutory truck fees, the plaintiffs filed their answer. That answer was a general denial to the counterclaim. Such general denial was a recognition of the legal power and authority of the Public Service Commission to collect the statutory fees. If plaintiffs should have desired to contest the right of the Public Service Commission or other defendants to maintain an action for the collection of the statutory truck fees, it was their duty to have challenged the power and authority of the Public Service Commission in their aforesaid answer to the counterclaim. This they did not do. They acquiesced in the contention of the Public Service Commission, and other defendants, that the Public Service Commission is a proper party to maintain an action to collect the fees.

[fol. 98] Furthermore, the stipulation entered into between plaintiffs and defendants, which was by the Court incorporated into and made a part of the temporary restraining order, was an express recognition on the part of plaintiffs that the Public Service Commission was the proper party to maintain an action to collect the aforesaid statutory truck fees.

Again, recognition by plaintiffs of the right of the Public Service Commission to collect the statutory truck fees from them is expressly incorporated into a certain stipulation filed in this Court on or about May 22, 1939, whereby plaintiffs released and remitted to defendant Public Service Commission statutory fees in the amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), which fees had been impounded by plaintiffs under the express provisions of a certain stipulation wherein plaintiffs recognized the Public Service Commis-

sion as the proper party to collect the statutory fees from them. Such stipulation was by the Court incorporated into the temporary restraining order.

Finally, recognition by plaintiffs of the authority of the Public Service Commission to collect the statutory fees from them by civil action is evidenced by their application for a temporary restraining order, and by the order of the Court granting the temporary restraining order and requiring the plaintiffs to deposit injunction bonds in the aggregate amount of Thirty Thousand Dollars ($30,000.00). The injunction bonds in the aggregate amount of Thirty Thousand Dollars ($30,000.00) were furnished by plaintiffs and filed in this cause, with the recognition of the Court and all parties that such bonds were for no other purpose than to protect the Public Service Commission against the loss of statutory fees which it had the right to collect of plaintiffs, if such fees should be declared to be legal, on behalf of the State of Missouri.

It is urged, therefore, that the Court has completely overlooked all of the aforesaid pleadings and papers in this case, which clearly indicate a recognition on the part of the Court as well as on the part of the parties that the Public Service Commission is the proper party to assert itself by [fol. 99] legal action, if necessary, for the collection of the statutory fees in question. Upon consideration of these papers of record, alone, the Court should take jurisdiction of defendants' motion for damages.

By supplementary answer defendants pleaded and submitted to the attention of the Court the entire Missouri Bus and Truck Act of 1931, together with all Rules and Regulations of the Public Service Commission of Missouri promulgated thereunder.

Commission Rules Nos. 14-B, 15-B and 16-B clearly indicate that travel orders must be purchased from the Commission and the money therefor remitted to the Commission. The evidence and pleadings in the case abundantly show that the far greater amount of money paid by plaintiffs for the use of the public highways was accustomed to be paid to the Public Service Commission as travel order fees. It is also the contention of the Commission that the law and Rules indicate a legislative intent that the Commission shall collect annual license fees from motor carriers.

Indeed, Section 5267-(a) provides:

"The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise, and regulate every motor carrier in this state * * *"

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. The Court should have no difficulty in deciding that the administrative agency committed with the duty of issuing annual and temporary licenses was intended by the Legislature also to be the state agency for collection of the license fees. Any other interpretation of the statute convicts the Legislature of blundering. The Court will credit the Legislature with having intended to enact a practical, workable law.

Moreover, Section 5267-(b) provides as follows:

"The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined * * *"

[fol. 100] Section 5268, among other things, provides:

"In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers * * *"

The Public Service Commission is authorized to establish such ports of entry and administer the law at such ports. There is no provision in the law for the State Treasurer to collect the fees at ports of entry or elsewhere.

The foregoing rules and sections of the statute clearly show a legislative intent to vest in the Public Service Commission authority to maintain suits at law or in equity for the purpose of collecting on behalf of the State of Missouri the statutory fees mentioned in Section 5272.

When the Court dismissed the counterclaim by means of paragraph IV of its decree, it did so without having given defendants an opportunity to be heard on the question of the counterclaim. They had no opportunity to present evidence by witnesses or otherwise to show that the Public Service Commission has always collected fees

from motor operators under the Missouri Bus and Truck Law. They had no opportunity to present evidence that the attorney general and the state treasurer have always manifested consent that the Commission is empowered to collect those fees. The Court should now set aside its order so that it may receive new and additional evidence on the subject that the Commission and other state officers of Missouri have always construed the Missouri Bus and Truck Law as empowering the Commission to collect the fees, and by suit if necessary.

In conclusion, it is urged that the three-judge court in this district, in the case of Frank Eichholz vs. Public Service Commission, et al., In Equity No. 660, 23 Fed. Supp. 587, upheld the power and authority of the Public Service Commission to maintain a civil action for collection of the statutory fees in Section 5272 of the Missouri Bus and Truck Act. Plaintiffs in that case appealed to the Supreme Court of the United States from the decree of the district court dismissing their injunction and taking jurisdiction of the counterclaim. The Supreme Court of the United [fol. 101] States affirmed the decree of the district court insofar as it pertained to the dissolution of the temporary injunction. If the Public Service Commission should, as a matter of law, be wholly without jurisdiction to maintain a civil action to collect the fees mentioned in Section 5272, it would have been the duty of the Supreme Court of the United States, on having the jurisdiction of the Public Service Commission expressly challenged, to do justice in behalf of appellants in that case by a decision directing the district court to dismiss the counterclaim for want of jurisdiction.

Respectfully submitted, James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE ORDER OVERRULING DEFENDANTS' MOTION FOR DAMAGES—Filed July 25, 1939

The motion of the defendants Public Service Commission of the State of Missouri, et al., to set aside the order of

this Court overruling defendants' motion for damages, is hereby overruled.

Archibald K. Gardner, Circuit Judge. J. C. Collet, District Judge. Merrill E. Otis, District Judge.

Dated at Kansas City, Missouri, this 24th day of July, 1939.

[fol. 102] RULES OF DEFENDANT PUBLIC SERVICE COMMISSION

(a).—Rule No. 7. Application for Temporary Permits by Interstate Carriers.—Each application for a temporary permit by interstate carriers for the transportation of passengers or property must be in writing and on blanks made available by the Commission; applicant must file with the original application two copies thereof; and the application must contain or be accompanied by:

(a) A statement showing the principal office or place of business and residence of the applicant, and a statement giving full and detailed information concerning the ownership and physical condition of the property used or to be used by the applicant.

(b) A recital showing whether the applicant is a person, firm, partnership, association, joint stock company, corporation, lessee, trustee or receiver appointed by any court whatsoever.

(c) A statement showing point of origin and point of destination of the passenger or commodity to be transported.

(d) A written document designating the Secretary of the Public Service Commission as the authorized agent upon whom legal service may be had in all actions arising in this state from any operation of motor vehicles under authority of such temporary permits.

(e) Each application for a temporary permit by an interstate carrier must be filed in the office of the Secretary of the Public Service Commission or at any duly authorized port of entry established by the Commission.

(b)—Rule No. 8. Fees for Temporary Permits of Interstate Carriers.—Each interstate carrier operating under authority granted by an interstate permit as provided by

Section 5268 of the Missouri Bus and Truck Law of Missouri, either for the transportation of persons or property shall pay the fees in advance for said temporary permit as hereinafter set out:

[fol. 103] For each motor vehicle operating under a temporary interstate permit as a freight-carrying vehicle the fees for the temporary permit shall be determined by actual load carrying capacity of said vehicle, as follows:

More than 1½ tons and not more than 4 tons	$2.00
More than 4 tons and not more than 7 tons	4.00
More than 7 tons and not more than 9 tons	7.00
More than 9 tons	9.00

For each motor vehicle operating under temporary interstate permits as a passenger-carrying vehicle of passengers for hire the fees for the temporary interstate permits shall be as follows:

Any bus of a carrying capacity of 7 passengers or less	$2.00
Any bus of a carrying capacity of more than 7 passengers and less than 18 passengers	3.00
All busses of a carrying capacity of 18 passengers or more	4.00

(c)—Rule No. 13. Ports of Entry.—Temporary interstate permits may be issued at the ports of entry which have been duly and legally designated by the Commission. The holder of such interstate permit card may enter this state through the port of entry after securing said temporary interstate permit from the keeper of said port of entry. If a temporary interstate permit card has been acquired from the Bus and Truck Department of the Public Service Commission at Jefferson City, the holder of said temporary interstate permit card may enter this state by displaying the same to the keeper of the Port of Entry provided the temporary interstate permit card that is presented to the keeper of the Port of Entry is a valid temporary interstate permit card and has not been used by the person, partnership, firm, association, trustee, lessee or receiver to whom the same was issued.

(d)—Rule No. 14-B. Emergency Vehicle, How May Be Used. In case of emergency or unusual demand for transportation other motor vehicles or trailers may be used by

an operator under his certificate or permit for a limited [fol. 104] period; Provided, that each case of such use of emergency or extra equipment shall be reported to the Commission on date of issue on emergency travel order form furnished by the Commission. All emergency equipment used under travel orders must be either owned or leased by the operator and operated by him, or his servant or servants. The Commission will issue such extra travel order forms in triplicate to any certificated operator in books of 5, 10, or 25, or at the request of the operator one such travel order may be purchased. One of the triplicate copies of this form must be in the possession of the driver of the vehicles when so used. Each order shall be good for one day as herein defined and no longer. If the vehicle is to be used for more than one day, separate travel orders must be issued by the operator for each day's operation. A day as defined by the Commission for freight-carrying vehicles is from 6 P. M. to 6 P. M. the following calendar day or from 12:01 A. M. to 12:01 A. M. the following day. For passenger-carrying vehicles the day is defined from 12:01 A. M. to 12:01 A. M. the following day. On the day that the emergency travel order is used by any certificated carrier or employee it is mandatory that the carrier issuing such travel order punch the day, month and year on the margin of the travel order to indicate the day the use of the travel order is to begin. The operator will be required to purchase and pay in advance for such extra travel order or orders at the time of issue by the Commission. The fee to be paid for said emergency travel order or orders shall be as follows:

For vehicles of more than 1½-ton actual load capacity to and including 4 tons actual load capacity each travel order $1.50 per day or part thereof when used as extra or emergency equipment; vehicles of more than 4 tons actual load capacity to and including 7 tons actual load capacity $2.00 per day or part thereof when used as extra or emergency equipment; vehicles of more than 7 tons actual load capacity to and including 9 tons $3.00 per day or part thereof when used as extra or emergency equipment; vehicles of more than 9 tons actual load capacity $4.50 per day or part thereof when used as extra or emergency equipment.

[fol. 105] In respect to passenger-carrying vehicles fees for the use of emergency equipment will be based on the

following schedule per day or any part thereof. Vehicles of 7 or less passenger capacity $1.00 per day or fraction thereof when used as extra or emergency equipment; vehicles of more than 7-passenger capacity and less than 18-passenger capacity $1.50 per day or fraction thereof when used as extra or emergency equipment; vehicles of more than 18-passenger capacity $2.00 per day or fraction thereof when used as extra or emergency equipment.

(e)—Rule No. 15-B. Issuance and Use of Travel Orders.—The Commission will have on hand for the purchase by the operator desiring travel order blank books containing 5, 10, and 25 emergency travel orders. Such travel order books shall be furnished in such form that each travel order blank will be issued in triplicate. Upon the use of each travel order the operator shall fill in or punch, as the case may be, the required date designating the certificate or permit number, the number of the tractor or trailer, name of driver, owner of vehicles, the name of the carrier, and the date the use of the travel order is to begin. The triplicate original of such travel order shall be immediately filed with the Commission. One triplicate copy to be carried by the driver of the vehicles and the third triplicate copy to be retained by the operator as stated in Rule 14-B. Any operator may purchase one travel order upon the payment of the required fee as set out in that rule.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT—Filed October 20, 1939

Now come the parties and stipulate, in accordance with Rule No. 75-(f) of the Rules of Civil Procedure, that the record on appeal may consist of copies of the following pleadings, documents and papers, with deletions and omissions therefrom of all irrelevant and formal portions, which have been made by counsel for the parties:

1. Bill In Equity, filed May 15, 1937.

2. (Temporary) Restraining Order and Order to Appear For Hearing, filed May 15, 1937.

[fol. 106] 3. Bond, in the amount of Ten Thousand ($10,000.00) Dollars, filed May 15, 1937.

4. Stipulation Of Parties, (adopted by the Court as a modification of Temporary Restraining Order), filed May 27, 1937.

5. Petition For Leave To Intervene, filed May 27, 1937.

6. Order Allowing Petitioners To Intervene, filed May 27, 1937.

7. Bond, in the amount of Twenty Thousand ($20,000.00) Dollars, filed September 8, 1937.

8. Defendants' Joint Answer, including Counterclaim of defendant Public Service Commission, filed September 17, 1937.

9. General Denial, filed against Counterclaim, September 22, 1937.

10. Defendants' Supplementary Answer, filed January 31, 1938.

11. Opinion, handed down June 15, 1938.

12. Findings Of Fact And Conclusions Of Law, filed July 2, 1938.

13. Amended Answer And Counterclaim, with Suggestions, lodged with Clerk on July 26, 1938.

14. Decree of Court, filed on August 4, 1938.

15. Petition For Rehearing And Motion To Modify The Decree, with Suggestions, filed September 3, 1938.

16. Order Modifying Decree And Overruling Petition For Rehearing, filed September 16, 1938.

17. Statement Of The Evidence, filed November 28, 1938.

18. Defendants' Motion For Costs, filed December 15, 1938.

19. Statement Of Appellees To Supplement Appellant's Statement Of Evidence, filed December 17, 1938.

[fol. 107] 20. Mandate of Supreme Court of the United States, filed April 24, 1939.

21. Stipulation, filed May 17, 1939.

22. Motion For Damages, filed May 22, 1939.

23. Order Overruling Motion For Damages, filed July 5, 1939.

24. Motion To Set Aside Order Overruling And To Reconsider Defendants' Motion For Damages, filed July 15, 1939.

25. Order Overruling Motion To Set Aside Order Overruling Defendants' Motion For Damages, filed July 25, 1939.

26. Notice Of Appeal, filed October 3, 1939.

27. Rules Of Defendant Public Service Commission:

(a) Rule 7—Application for Temporary Permits by Interstate Carriers.

(b) Rule 8—Fees for Temporary Permits of Interstate Carriers.

(c) Rule 13—Ports of Entry.

(d) Rule 14-B—Emergency Vehicle, How May Be Used.

(e) Rule 15-B—Issuance and Use of Travel Orders.

Dated this 19th day of October, 1939.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Counsel for Defendants; Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Counsel for Plaintiffs.

[fol. 108] In United States District Court

Point Upon Which Appellants Intend to Rely—Filed October 20, 1939

Defendants intend to rely upon the following points:

1. The Court abused its discretion in overruling defendants' motion for damages filed on May 22, 1939:

(a) It threw defendants out of Court without giving them an opportunity to present evidence of numerous items

of expenses and damages incurred whilst defending against the improvidently issued restraining order.

(b) It deprived defendant state officers of their right to recover in damages, on behalf of the State of Missouri, the statutory license fees which plaintiffs would have been compelled to pay except for the effectiveness of the restraining order.

(c) The Court was duty bound to render equity to the defendants on matters of damages incurred by them as a direct result of the restraining order.

(d) By modifications of the temporary restraining order on May 27, 1937, the Court recognized and sanctioned the right of defendants to recover from plaintiffs the statutory fees in question.

2. The Court erred in overruling the aforesaid motion for damages on the grounds that none of the defendants, especially defendant Public Service Commission, are proper parties to maintain an action in damages against plaintiffs for failure and refusal to deposit all of the statutory license fees with the Trustee, as they were obligated to do under the terms of the Stipulation of parties which was by the Court incorporated into its temporary restraining order.

3. The Court erred in overruling the aforesaid motion and relegating defendants to seventy-six separate actions at law in many different States to recover statutory fees for the use of the public highways, which fees the Court itself ordered plaintiffs to deposit with the Trustee named [fol. 109] in the Stipulation of parties, and which fees plaintiffs failed and refused to deposit with said Trustee.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Counsel for Defendants.

Received a copy hereof this 19th day of October, 1939.
Kenneth Teasdale, Atty. for Plaintiffs.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 110-111] Appearances of counsel omitted in printing.

[fol. 112] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

NOTICE OF FILING OF MOTION OF APPELLEES TO DISMISS APPEAL —Filed May 11, 1940

To the Appellants herein and their counsel of record:

Please take notice that the undersigned on behalf of appellees have filed a motion to dismiss the appeal taken in this cause, a copy of which is attached to this notice, and that on the 14th day of May, 1940, at which time the case is set for argument, or as soon thereafter as counsel can be heard, we shall submit the same to the Honorable Circuit Court of Appeals for the Eighth Circuit, at St. Paul, Minnesota, for decision.

Kenneth Teasdale, B. W. LaTourette, P. G. Koontz, Solicitors for Appellees.

Service of a copy of the within notice acknowledged this 9 day of May, 1940.

James H. Linton, Daniel C. Rogers, Solicitors for Appellants.

[File endorsement omitted.]

[fol. 113] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,618. Civil

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al., Appellants,

v.

BRASHEAR FREIGHT LINES, INC., et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

MOTION OF APPELLEES TO DISMISS THE APPEAL—Filed May 10, 1940

Now come appellees and move the Court to dismiss the appeal filed herein and for cause show:

(1) that it appears said appeal was not sued out within three months of the entry of final judgment in the cause;

(2) that the appeal is from an order entered in the second term subsequent to the judgment term;

(3) because the appeal is from a so-called motion for damages which itself was filed during the second term subsequent to the judgment term;

[fol. 114] (4) because the appeal is from an order overruling, in effect, a motion for new trial or petition for rehearing, which motion for new trial or petition for rehearing was filed after the term at which judgment was entered;

(5) because the appeal is from an order overruling, in effect, a motion for new trial, one motion for new trial having theretofore been filed, submitted and overruled;

(6) because the appeal is from a motion purportedly for damages, but, in effect, a counterclaim, which counterclaim as to part of the appellees had been previously dismissed by the Court, and as to part of appellees constituted the assertion of an original counterclaim after hearing and final decree;

(7) because the appeal is from an order overruling a purported motion for damages, which motion does not seek the ascertainment of the extent of damages awarded by the decree of the three-judge court, but of damages disallowed by the three-judge court.

Respectfully submitted, Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 25, 1940

This cause being this day reached on the calendar the same is at the request of counsel for the respective parties, submitted to the Court without oral argument on the transcript of the record from said District Court, the motion of appellees to dismiss appeal and on the briefs of counsel filed herein.

[fol. 116] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11,618. May Term, A. D. 1940

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al.,
Appellants,

vs.

BRASHEAR FREIGHT LINES, INC., et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. James H. Linton, General Counsel, and Mr. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, submitted brief for appellants.

Mr. Kenneth Teasdale, Mr. B. W. LaTourette, and Mr. Paul G. Koontz submitted brief for appellees.

Before Woodrough and Thomas, Circuit Judges, and Bell, District Judge

OPINION—August 26, 1940

[fol. 117] WOODROUGH, Circuit Judge, delivered the opinion of the court:

The Public Service Commission of Missouri and certain State officers appeal from an order of a three-judge court overruling their motion for damages claimed to have been sustained as the result of the improvident issuance of a restraining order, later dissolved by the court. The suit was brought by the Brashear Freight Lines, Inc., and other trucking concerns, against the Commission and the State officers to enjoin the enforcement of the trucking taxes imposed under the Missouri Act of May 6, 1931 (Sections 5264-5280 Art. VIII C. 33) on the ground of unconstitutionality, and tax payments were suspended by virtue of the restraining order pending final determination of the suit for injunction.

The defendants denied that the taxes were unconstitutional and prayed the court by way of counter-claim to enforce the collection of the accruing taxes. The trial court of three judges held the Act valid, denied injunction, dis-

solved the restraining order and dismissed the petition. It declined to try the counter-claim and dismissed the same without prejudice. The defendants in the suit appealed directly to the Supreme Court from the order dismissing their counter-claim, but the Supreme Court held that it had no jurisdiction of a direct appeal on that issue and remanded the case (apparently to the three-judge court). Public Service Commission v. Brashear, 306 U. S. 204. Thereupon the defendants in the suit presented to the court of three judges their motion "to determine and assess damages and costs" against each and every plaintiff in the cause and their respective bondsmen. The motion was limited by its terms to the fees and taxes claimed to have accrued against the numerous truckers between the issuance of the restraining order and the date of the motion, i. e., during the period from May 15, 1937, to May 22, 1939. [fol. 118] The court overruled the motion and the defendants appeal.

It appears that the Brashear Freight Lines, Inc., and some forty other corporations engaged in the business of automobile truck transportation were subject under the terms of the 1931 Motor Bus and Truck Laws of Missouri to certain license fees charged by the State for use of its highways, such fees being charged on a schedule which graduated the amount of the fee with regard to the weight-carrying capacity of the truck to be licensed. The Act also prescribed fees of 50% of the maximum for short twenty mile runs into the State, and 33⅓% for ten mile runs. The short run licensing provisions were difficult to enforce and were largely left unenforced. The truck companies on May 15, 1937, found themselves threatened with enforcement of the licensing provisions by criminal prosecution, penalties and forfeitures, and deeming the law unconstitutional they brought this action in the U. S. District Court for a preliminary and final injunction against the Public Service Commission, the Superintendent of Highway Patrol and the Attorney General, State officers charged with the duty of enforcing collection of the fees. The verified bill prayed for a restraining order against enforcement of the law, and since a prima facie right thereto was shown, the District Court granted the restraining order upon deposit of a bond in the amount of $10,000.00. The parties entered into a stipulation whereby the truck companies bound themselves to make reports of truck entries into the state, and

to pay the amount of license fees to a trustee; the Public Service Commission did not bind itself or the State of Missouri to be responsible for collection of any checks or money orders paid to the trustee and did not waive any rights to collect any amount found due to the State upon determination of the cause. On the day this stipulation was filed, May 27, 1937, some thirty other trucking concerns, to-wit, [fol. 119] corporations, partnerships and individuals,—petitioned for intervention in the action and were permitted to intervene upon filing a bond in the amount of $20,000.00 which incorporated the stipulation entered into by the original parties to the suit. The counter-claim filed by defendants contained allegations that "certain of" the plaintiff truck concerns had not paid all the fees owing under the Act through the six years of its operation, that it was difficult for defendants to serve most of the plaintiffs with process since they were not resident in Missouri, and that defendants did not have knowledge of the number of vehicles for which fees had not been paid, nor their carrying capacity. It was also alleged that

"'The amounts due and payable in license fees as aforesaid are not unliquidated, but are liquidated, definite and certain sums which could be accurately determined upon a proper accounting. Although such account could be accurately stated, if the facts were at hand, the taking of said account would be long and complicated."

Defendants prayed for equitable relief of accounting to determine the amount of the fees and enforcement of payment against the numerous plaintiffs.(1) The truck concerns filed a general denial, which they say was merely a temporary pleading to avoid default and was filed with the understanding that they might later attack the propriety of the counter-claim and defendants' right to present it in the action. This was controverted.

At the trial of the merits of the case before the three-judge court, consideration of the counter-claim was deferred for hearing subsequent to trial of the injunction issue. When hearing on that issue was completed, however, the

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(1) This court has held that tax collection suits are not within equity jurisdiction as actions for accounting. City of Sedalia v. Standard Oil Co. of Indiana, 66 F. 2d 757, 761.

counter-claim was not presented or tried, and the court, in [fol. 120] the entry of its decree, included the following ruling upon the defendants' counter-claim:

"That the issue raised by the defendants' counter-claim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counter-claim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."

Upon motion of defendants the court modified the decree by striking from this sentence of the decree the words "not having been urged nor presented by the parties", so that only dismissal of the counter-claim without prejudice was effected. The motion for damages was filed after the mandate of the Supreme Court had come down; the motion recited the restraining order, the stipulation of the parties, the deposit of the restraining order bonds and alleged failure of compliance on the part of the truckers. The motion contained a prayer that the court take such steps as might be required to ascertain and determine the amount of license fees accrued and unpaid and to assess said sum and costs as damages in favor of the defendants or the State of Missouri or the State Treasurer and for judgment for the amounts against the plaintiffs and against their bondsmen to the extent of the bonds. On the hearing of the motion, July 5, 1939, the court indicated that it had passed upon the controlling question in its decree entered August 4, 1938. The motion was accordingly denied.

Whether a court which issues, and then on hearing dissolves, a restraining order, will entertain a motion to assess damages at the instance of the defendant in proceedings ancillary to the main action, or whether such court will remit the petitioner to his separate action by dismissing without prejudice, is in this circuit a matter within the dis- [fol. 121] cretion of the court. In United Motors Service, Inc. v. Tropic-Aire, Inc., 57 F. 2d 479, this court made exhaustive review of the authorities and announced its conclusion that dismissal without prejudice of a motion to assess damages in such a situation would be set aside only when the discretion of the court was abused—that the

discretion is not questioned for wisdom, but only for abuse. We think the decision controlling against the appellant here. The contention is made that the dismissal without prejudice was not entered in the exercise of the court's discretion, but we think it clear from the record that such contention is without merit. It is true the trial court commented that it entertained a doubt whether the necessary parties to a litigation of the damages were before the court, but it did not find or declare a defect of parties. It merely decided within its discretion that it would not entertain the ancillary litigation.

We think that the court of three judges properly limited itself to the function for which it was specially constituted and rightly declined to enter upon the trial and adjudication of an ancillary litigation involving on the petitioners' own showing a "long and complicated" inquiry. 'The nature of the special tribunal justifies its questioning critically concerning the character of any case of which it is called upon to take jurisdiction, and it should refuse to enter upon the trial of matters of which it is not required to take cognizance. As said by the Supreme Court in Oklahoma Gas Co. v. Packing Company, 292 U. S. 386-391, "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. *Ex parte Collins*, 277 U. S. 565-569."

The restraining order in this case was issued and the conditions and terms of the security for damages were [fol. 122] fixed by the District Judge in the Western District of Missouri. His action in the matter of imposing conditions and exacting security from the plaintiffs and interveners was effective to the extent that more than a hundred thousand dollars of fees and taxes were obtained by the State without litigation. The defendants' only claim was that the action taken by the judge had not been completely effective. The three-judge court had had nothing to do with the matter of prescribing the conditions of the restraining order. It fully performed its special function of adjudicating upon the constitutionality of the questioned Act. The defendants' mistaken assumption that their incidental claim presented a controversy directly reviewable in the Supreme Court doubtless led them to press it for determination by the three-judge court. See and compare,

Eichholz v. P. S. Commission, 306 U. S. 268. We think the proper procedure in such a situation as here presented requires that the three-judge court which has discharged its essential function of adjudicating upon constitutionality, should, upon presentation of the facts by the parties, remit any such ancillary litigation to the District Judge for proceedings "to be taken independently of Sec. 266 of the Judicial Code." Such procedure seems to be indicated by the cases.(2) But we do not decide that the three-judge court was without jurisdiction to enter its decree and order dismissing the proposed ancillary litigation. It had such discretion and there was no abuse.

Affirmed.

DISSENTING OPINION

BELL, District Judge, dissenting.

A three-judge court was assembled in this case to determine the constitutionality of the state statute that was involved and not for any other purpose. When it performed [fol. 123] that function it should have referred all other issues in the case to the proper Judge of the District Court of the United States for the Western District of Missouri for appropriate proceedings, and such action would have been in accordance with the rule announced by the court, as follows: "We think the proper procedure in such a situation as here presented requires that the three-judge court which has discharged its essential function of adjudicating upon constitutionality, should, upon presentation of the facts by the parties, remit such ancillary litigation to the District Judge for proceedings to be taken independently of Section 266 of the Judicial Code." I fully approve of this rule and think it should be followed in this case.

The court has cited United Motors Service, Inc. v. Tropic-Aire, Inc., 57 F. 2d 479, as authority for the principle that

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(2) Massachusetts v. Missouri, 60 S. Ct. loc. cit. 43, 308 U. S. loc. cit. 19; see Rorick v. Commissioners, 307 U. S. 208, 213; Wm. Jameson & Co. v. Morgenthau, 307 U. S. 171, 174; Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U. S. 386, 392; Cf. Wilentz v. Sovereign Camp, W. O. W., 306 U. S. 573, 582. Ex parte Bransford, 60 S. Ct. 947, 951.

dismissal of the issue presented by the counter-claim was within the jurisdiction of the court. That was a patent case where a District Judge was sustained in holding that, in dissolving a temporary injunction against patent infringement, the court had discretion to retain the case and determine damages under the injunction bond in an ancillary proceeding or leave the parties to an action at law. The principle there announced has no applicability to the jurisdiction of a three-judge court.

In my opinion, the three-judge court in this case was without jurisdiction to dismiss defendant's counter-claim.

[fol. 124] In United States Circuit Court of Appeals, Eighth Circuit. May Term; 1940

No. 11618

Public Service Commission of the State of Missouri; State Highway Commission of Missouri; B. M. Casteel, Superintendent of the Missouri State Highway Patrol; and Honorable Roy McKittrick, Attorney General of the State of Missouri, Appellants,

vs.

Brashear Freight Lines, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri

Decree—August 26, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in this cause be, and the same is hereby, affirmed with costs; and that the Brashear Freight Lines, Inc., et al., have and recover against the Public Service Commission of the State of Missouri; State Highway Commission of Missouri; B. M. Casteel, Superintendent of the Missouri State Highway Patrol; and Honorable Roy McKittrick, Attorney General of the State

of Missouri, the sum of Twenty Dollars for their costs herein and have execution therefor.

[fols. 125-137] Petition for rehearing covering 13 pages filed Sept. 10, 1940, omitted from this print. It was denied, and nothing more by order of Sept. 18, 1940.

[fol. 138] In United States Circuit Court of Appeals

Order Denying Petition of Appellants for Rehearing—September 18, 1940

The petition for rehearing filed by counsel for the appellants having been considered, It is now here Ordered by this Court that the same, be, and it is hereby, denied.

[fol. 139] In United States Circuit Court of Appeals

Motion of Appellants to Stay Mandate—Filed September 26, 1940

Now come appellants and move the Court to stay its mandate in this cause for a period of thirty days from September 30, 1940, pending application to be made within the period of said stay to the Supreme Court for writ of certiorari.

James H. Linton, Daniel C. Rogers, Covell R. Hewitt, Edgar H. Wayman, Harold C. Hanke, Louis V. Stigall, Wilkie B. Cunnyngham, Attorneys for Appellants.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 4, 1940

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of

the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 16, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 44,898. U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 549. Public Service Commission of the State of Missouri, et al., Petitioners, vs. Brashear Freight Lines, Inc., et al. Petition for a writ of certiorari and exhibit thereto. Filed November 4, 1940. Term No. 549. O. T. 1940.